TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1396.~~ ~~985~~ 651 344

LOUIS STEIN, EXECUTOR OF THE ESTATE OF ALBERT STEIN, DECEASED, APPELLANT,

vs.

THE BIENVILLE WATER SUPPLY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

FILED MARCH 27, 1888.

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1 *Bill of Complaint.*

In the Circuit Court of the United States for the Southern District of Alabama. In Equity.

LOUIS STEIN, Ex'r, &c.,
vs.
THE BIENVILLE WATER SUPPLY COMPANY. } 150.

To the judges of the circuit court of the United States for the southern district of Alabama:

Louis Stein, a citizen of the State of Alabama, residing in Mobile county, and executor of the estate of Albert Stein, deceased, brings this his bill of complaint, as such executor, against "The Bienville Water Supply Company," a corporation incorporated by a special act of the Legislature of the State of Alabama, and which is a citizen of said State of Alabama, having its home office in the city of Mobile; and thereupon your orator complains and says—

2 1st. That in the year 1820 the State of Alabama, by its senate and house of representatives, passed an act entitled "An act to incorporate an aqueduct company in the city of Mobile," the preamble of which said act is as follows:

"Whereas it has been represented that it would be of singular advantage to the health and commerce of the city of Mobile to be supplied with water from some of the running streams in its vicinity, which would be attended with too much labor and expense to be effected by laying a tax for the purpose; and whereas it has been represented that certain individuals have agreed to associate themselves together for the purpose of conducting a supply of water from a creek called the Three-Mile creek, otherwise Bayou Chatogue, for the use of the citizens and other persons residing in the city of Mobile."

3 A copy of said act of incorporation is hereto appended, marked Exhibit "A," and made part of this bill of complaint.

Your orator further shows that in and by the 3rd section of said act it is provided that said aqueduct company and their successors "shall have and enjoy the exclusive right and privilege of conducting and bringing water for the supply of said city for the space of forty years."

2nd. Your orator further shows that said aqueduct company failed to build said water works according to the requirements of said act of incorporation aforesaid, and that, on the 24th day of December, 1824, the senate and house of representatives of the State of Alabama passed an act amending and altering the charter of the city of Mobile, and, among other things therein and thereby

4 granted, it is, by the 18th section of said act, provided as follows:

"SECTION 18. And be it further enacted, That the act entitled an act to incorporate an aqueduct company in the city of Mobile, passed December the twentieth, eighteen hundred and twenty, be, and the same is hereby, declared null and void; and the said corporation

having failed to comply with the requisitions of said act, *and* all the rights, privileges, and immunities, powers, prerogatives, and authority which appertained to the said company by virtue of the aforesaid act are hereby transferred to and vested in the said corporation of the city of Mobile for the use and benefit of the inhabitants thereof."

3rd. Your orator further shows that from December 24th, 1824, to December 1st, 1836, the said city of Mobile made very little
5 progress towards introducing and bringing water into said city for the use of the inhabitants thereof, and the scheme of building a system of water works was about to fall through entirely, when, on the 1st day of December, 1836, said city of Mobile entered into an agreement with Henry Hitchcock whereby said city leased and let to the said Hitchcock said water works property for the term of twenty years, in which said lease or agreement it is expressly stipulated that said Henry Hitchcock, his executors, administrators, and assigns, should during the said term of twenty years have the exclusive privilege of furnishing to the citizens and inhabitants of the city of Mobile water from the aqueduct or water works aforesaid. A copy of said agreement is hereto appended, marked Exhibit "B," and made part of this bill of complaint.

4th. Your orator further shows that in December, 1837, the
6 said Henry Hitchcock obtained from the senate and house of representatives of the State of Alabama an act entitled "An act to incorporate the Mobile Aqueduct Company," which said act was approved December 25th, 1837. A copy of said act is hereto appended, marked Exhibit "C," and made part of this bill of complaint.

That by the 4th section of said act it is provided " that from and after the first election, as provided by the second section of this act, the said subscribers shall constitute a body politic and corporate by the name and style of 'Mobile Aqueduct Company,' and as such shall be taken, known, and held in law, and shall so continue until the first day of December, 1856, and until they shall have been purchased out by the corporation of the city of Mobile, as is hereinafter provided, during which period the said company shall have
7 and enjoy all the rights, privileges, and immunities which are contained in the act entitled 'An act to incorporate an aqueduct company in the city of Mobile,' passed the 20th day of December, 1820, which act, except as modified by this act, is hereby revived and declared to be in force during the continuance of this act."

5th. Your orator further shows that said Henry Hitchcock died shortly after obtaining said charter from the Legislature of Alabama, and said water works property again passed into the possession of said city of Mobile about the year 1839, and the building of said system of water works contemplated by said company fell through.

That the said city of Mobile was exceedingly anxious that said system of water works should be constructed and its inhabitants supplied with good, wholesome water, but it had not the means,

credit, or ability to undertake the work itself, nor could
8 it get capitalists to undertake the labor, expense, and risk of building and constructing said system of water works and supplying the inhabitants of said city with water without securing to such person the full and exclusive right and privilege of supplying the said city of Mobile and the inhabitants thereof with water by said system of public water works, to the exclusion of all other persons or companies, for a certain fixed time, and thereafter until said city of Mobile should redeem or purchase said water works system by paying therefor its actual value to the party constructing the same; that accordingly, and in order to secure the erection and construction of said system of public water works, the said city of Mobile, on the 26th day of December, 1840, entered into articles of agreement with your orator's testator, the late Albert Stein, deceased, whereby said city of Mobile agreed and stipulated with said
9 Albert Stein, among other matters and things, that it would, and thereby did, grant unto the said Albert Stein, his heirs, executors, administrators, and assigns, the sole privilege of supplying the city of Mobile with water from the Three-Mile creek for twenty years from the date of said agreement, as well as all the advantages and benefits which accrued to the said mayor, aldermen, and common council of the city of Mobile by or under an act of the Legislature of the State of Alabama, entitled "An act to incorporate an aqueduct company in the city of Mobile," passed December 20th, 1820, and all ordinances and resolutions passed by the said mayor and aldermen of the city of Mobile under and by virtue of the said act or by the act of incorporation of the said city of Mobile and the several acts amendatory thereto, which in any way or manner relates to the said "city water works or the right to supply said city
10 with water," as well as all the benefits and advantages which accrued to the said mayor, aldermen, and common council, or the mayor and aldermen of the city of Mobile, from, by, or under an act of the Legislature of the State of Alabama, entitled An act to incorporate the Mobile Aqueduct Company, passed December 25th, 1837; to have and to hold the above mentioned and described privileges, together with all and singular the appurtenances unto the same belonging or in anywise appertaining, unto the said Albert Stein, his executors, administrators, and assigns, from the date thereof, for, during, and until the full end and term of twenty years thence next ensuing; and that he (said Stein), his executors, administrators, and assigns, should have quiet possession of the said works during their erection and after they shall be completed for the term of twenty years, and for any further
11 time until the said city of Mobile should redeem the said works from the said Stein, according to the stipulations contained in said agreement, and that the said Albert Stein, his executors, administrators, and assigns, should, during the said term of twenty years or any further time until said works are redeemed, as in said contract stipulated, have the exclusive privilege of supplying to the citizens and inhabitants of the city of Mobile water from the water works aforesaid, without let, molestation, or hindrance.

That it was furthermore agreed by the said parties to the aforesaid contract or agreement that the said city of Mobile would, at the expiration of the said term of twenty years (he, the said Albert Stein, his executors, administrators, and assigns, delivering up the said water works and appurtenances in good order and con-
12 dition), pay to him, his executors, administrators, or assigns, their actual value, as determined by six arbitrators, three to be chosen by the mayor, aldermen, and common council of the city of Mobile and three by the said Albert Stein, his executors, administrators, or assigns, provided that the said arbitrators should not be members of the corporation of the city of Mobile; and if said arbitrators should agree and so report, in writing, their award should be binding on the respective parties, but in case of disagreement the value of the said works should be left to the watering committee of the city of Philadelphia or such committee of said city of Philadelphia, by whatever name, as may be charged with the water works of said city, whose decision and award, in writing, reported to the mayor, aldermen, and common council of the city of Mobile, should be binding and conclusive.

In order that your honors may comprehend more thor-
13 oughly the full scope and meaning of said agreement *of said agreement*, your orator hereto appends a copy of said agreement, together with the act of the Legislature of the State of Alabama ratifying and confirming the same and granting to your orator's testator the aforesaid exclusive privileges and franchises, marked Exhibit "D" and made part of this bill of complaint.

6th. Your orator further shows that his testator, the said Albert Stein, acting in good faith and believing and supposing that he was obtaining the full and exclusive privilege and right of supplying the city of Mobile and the inhabitants thereof with water by a system of public water works, to the exclusion of all other persons or companies, for the period of twenty years from the said 26th day of December, 1840, and after the expiration of said period of
14 twenty years for such further time until the said city of Mobile should purchase or redeem the said water works, according to said contract or agreement, by paying to orator's testator the actual value of said works, he, the said Albert Stein, set about and, out of his own private fortune and by borrowing money from others, raised the means to build, and did build and erect and construct, at an outlay and expense of more than two hundred thousand dollars, a system of public water works to supply said city of Mobile and the inhabitants thereof with water, in strict conformity to and compliance with the aforesaid contract and agreement; and orator's said testator and orator, as such executor, have ever since maintained and kept the same in good order and condition and in all respects observed the aforesaid contract and agreement; that the said city of Mobile has not redeemed or purchased or offered to redeem or
15 purchase said water-works property, as by said contract it agreed to do, although said period of twenty years has long since expired; that in the year 1879 the Legislature of the State of Alabama repealed the charter of the city of Mobile and immediately

thereafter, and at the same session of the Legislature, passed an act incorporating the municipal corporation known as the "Port of Mobile," embracing, however, substantially the same territory and people and public property as that included in the city of Mobile; that said municipal corporation called the "Port of Mobile," succeeded to all the rights, powers, and authority possessed by the said city of Mobile, and said Port of Mobile recognized the validity, efficacy, and continuance of the aforesaid contract of December 26th, 1840, as will more fully appear by reference to their action in respect thereto, and especially to the action of its board of police commissioners had in July, 1883, as appears by the minutes of said board, a copy of which is hereto appended, marked Exhibit "E," and made part of this bill of complaint.

That the said Albert Stein departed this life in the year 1874, leaving a last will and testament, whereby your orator is named as sole executor, and as such specially charged with the duty of managing and controlling said water works. A copy of said bill is hereto appended and marked as Exhibit "F" and made part of this bill of complaint.

7th. That, by reason of the premises, the city of Mobile and the State of Alabama became and were obliged in equity and good conscience to warrant, maintain, and protect complainant's said testator and complainant as his executor in the full right and exercise of their said exclusive rights and privileges aforesaid of supplying said city of Mobile and the inhabitants thereof with water without let, hindrance, or molestation until the said city of Mobile shall have redeemed and purchased from and paid to complainant, as the executor of said Albert Stein, the actual value of said water works according to said contract aforesaid.

That the said agreement or contract created between the said city of Mobile and the State of Alabama and complainant's said testator obligations which were and are sacred under and by virtue of section ten of article one of the Constitution of the United States, which the said State of Alabama or the city of Mobile cannot destroy or impair; yet your orator shows that, notwithstanding the duty resting upon the State of Alabama and the said city of Mobile to warrant, maintain, and protect him in the full right and exercise of his exclusive rights and privileges aforesaid without let, molestation, or hindrance, as by said contract they agreed to do, the said State of Alabama did, on the 19th day of February, 1883, in disregard of the rights of complainant and of the obligations of its said contract aforesaid, pass an act by its Legislature incorporating a company, called the Bienville Water Supply Company, in hostility to the rights of complainant and with the avowed object and purpose, as contained and expressed in said act of incorporation, to destroy complainant's said rights and privileges aforesaid and vest in said Bienville Water Supply Company the property and franchise of complainant, contrary to the terms of said contract aforesaid; that said act of the Alabama Legislature undertakes to give to the said Bienville Water Supply Company the exclusive right and privilege of supplying the city of Mobile

and the inhabitants thereof with water, which is repugnant to the contract made with complainant's testator and which grant is intended to and will molest and hinder complainant in the exercise of his exclusive right and privilege of supplying said city of Mobile and the inhabitants thereof with water under said contract of December 26th, 1840.

Your orator hereto appends as Exhibit "G" a copy of said act of the Alabama Legislature incorporating said Bienville Water Supply Company, as amended by act of February 4th, 1885, and prays that the same may be taken as part of this bill of complaint. Your
20 orator invites your honor's attention especially to sections 9, 10, & 11 of said act as evincing the intent to injure complainant in his property rights and to deprive him of his said franchise and the benefits of said contract of December 26th, 1840. Your orator shows that his system of water works was the only one in existence in Mobile at the time of the passage of said act and is the water works referred to in said sections 9, 10, & 11 of said act.

8th. Your orator further shows that the said Bienville Water Supply Company, under color and pretence of the rights granted to it by the aforesaid act of the Legislature of Alabama, has employed a large force of men and are now engaged in laying down pipes and mains for the avowed purpose of conducting water into the city of Mobile to supply to the city and the inhabitants thereof;
21 that neither the State of Alabama nor the city of Mobile has attempted in any manner to prevent said Bienville Water Supply Company laying its said pipes through the streets of Mobile nor to prevent said company conducting water into said city of Mobile, as it proposes to do, to supply to the city of Mobile and the inhabitants thereof, to the great injury and damage of complainant.

That on the 5th day of March, 1887, the said Bienville Water Supply Company addressed the following communication to the officials of the city of Mobile, which the said officials received and filed and took no action thereon, to wit:

"OFFICE BIENVILLE WATER SUPPLY CO.,
MOBILE, ALA., *March* 5, 1887.

To the honorable president and board of police commissioners of Mobile.

GENTLEMEN: The Bienville Water Supply Company of
22 Mobile, in the prosecution of their work, have reached with their pipe-laying the western limits of the city, and, under their charter granted by the General Assembly of Alabama, they propose at once to enter the corporate limits of the city, with the intention of laying pipes through such streets and alleys as may best facilitate them in their purpose of furnishing an abundant and adequate supply of water for the city and the inhabitants thereof.

With great respect,

BIENVILLE WATER SUPPLY CO.,
GEO. A. KETCHUM, *Pres.*"

Orator further shows that the proceedings and pretensions of the said Bienville Water Supply Company under its said charter have already injured him, and if continued will undoubtedly inflict upon him and the estate of his said testator irreparable damage.

Prayer.

The premises considered, your orator prays your honors to
23 take jurisdiction of this his bill of complaint, and that the said defendant may answer the premises; and that the said defendant, its officers, agents, and servants, may be restrained by the injunction of this honorable court from laying its said pipes in, along, or through the streets and alleys of the said city of Mobile for the purpose of furnishing water through the same to the inhabitants of the city of Mobile, and from conducting water through its said pipes into the city of Mobile for the purpose of furnishing and supplying the same to the inhabitants thereof; and that it may be, in like manner, restrained from molesting or hindering complainant in the full and exclusive right and privilege of supplying the city of Mobile and the inhabitants thereof with water under his said contract of December 26th, 1840; and that
24 your orator may have such other and further or different relief in the premises as the nature and circumstances of his case may require and to your honors shall seem meet and proper—

May it please your honors to grant unto your orator the writ of subpœna of the United States of America, to be directed to the said Bienville Water Supply Company, a corporation created by act of the Legislature of Alabama, thereby commanding it, at a certain day and under a certain penalty therein to be specified, to be and appear before your honors in this honorable court, and then and there to answer (but not under oath, such oath being hereby expressly waived) all and singular the premises, and to stand to, perform, and abide by such orders and decrees therein as to your honors shall seem meet.

And your orator shall ever pray, &c.

(S'g'd) L. H. FAITH,
Solicitor for Complainant.

25 NOTE.—The defendant is required to answer, but not under oath, each and every paragraph of the foregoing bill of complaint, from one to eight inclusive.

(S'g'd) L. H. FAITH,
Solicitor for Complainant.

Filed April 25, 1887.
(S'g'd) N. W. TRIMBLE, *Clerk.*

26 EXHIBIT "A."

"An act to incorporate an aqueduct company in the city of Mobile."

Whereas it has been represented that it would be of singular advantage to the health and convenience of the city of Mobile to be

supplied with water from some of the running streams in its vicinity, which would be attended with too much labor and expense to be effected by laying a tax for the purpose; and whereas it has also been represented that certain individuals have agreed to associate themselves together for the purpose of conducting a supply of water from a creek called Three-Mile creek, otherwise Bayou Chatogue, for the use of the citizens and other persons residing in the city of Mobile: Therefore—

SECTION 1. Be it enacted by the senate and house of rep-
27 resentatives of the State of Alabama in General Assembly convened, That Lewis Judson, Addison Lewis, Archibald N. Gordon, William H. Robertson, and Francis W. Armstrong, their heirs, executors, administrators, and assigns, be, and they are hereby, created and constituted a corporation and body politic by the name and style of "The Mobile Aqueduct Company," and by that name they shall be and are hereby made able and capable in law to have, purchase, receive, possess, enjoy, and retain to them and their successors lands, rents, tenements, hereditaments, goods, chattels, and effects of whatever kind, nature, and quality, and the same to sell, grant, demise, alien, and dispose of; to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in any suit, action, matter, or thing depending in any court of law or equity, and also to make and have and use
28 a common seal, and the same to break, alter, and renew at their pleasure, and also to ordain, establish, and put in execution such by-laws, ordinances, and regulations as they shall deem necessary and convenient for the government of said corporation and for the attainment of the object of its creation, not being contrary to the charter or the laws of this State or of United States, and generally to do and to execute all and singular the acts, matters, and things which to them may appear necessary or which to them it may appertain to do as incident to bodies corporate, under the restrictions before mentioned.

SEC. 2. That the members of the said corporation be, and they are hereby, authorized and empowered, as soon as practicable and by the best means in their power and by the nearest practicable route, to dig or cause to be dug a channel or canal sufficiently
29 deep and wide to contain logs of an aqueduct size, with a caliber large enough to contain and conduct a sufficiency of water to supply the citizens and other persons of Mobile with water, and from time to time and at all time hereafter during the continuance of this charter to enter upon the route and course of the said canal or ditch as they may deem it necessary for the purpose of laying, repairing, altering, or amending the said logs, canal or ditch, hereby declaring it lawful for the members of the said corporation or any or either of them, their successors or assigns, or others employed by them for that purpose from time to time, as often as in their opinions it may be necessary, to enter upon the lands of any person through which the said canal or ditch may pass for the purpose of opening the said canal or ditch and placing

the logs therein, and from time to time and at all other
30 times thereafter during the continuance of this franchise to re-enter as often as they may deem it necessary so to do for the purpose of repairing the aforesaid canal or ditch or replacing any logs that may be decayed or otherwise injured, they being liable and accountable to the legal owner or owners of the land through which the said canal or ditch may pass for any special damages that may be sustained by reason of the aforesaid canal or ditch being dug and continued as aforesaid, which said damages shall be ascertained by appraisers, two of whom shall be chosen by said corporation and two others by the owner of owners of said land, and in case of difference the said four appraisers shall choose a fifth appraiser as arbitrator, and the appraisement by them shall be conclusive on both parties as to the damage done: Provided nevertheless, That
31 the said canal or ditch shall not be dug through any lot or lots in the city, but shall be conducted along any of the streets thereof as may be most practicable.

SEC. 3. And be it further enacted by the authority aforesaid, That the said corporation and their successors shall have and enjoy the exclusive right and privilege of conducting and bringing water for the supply of said city for the space of forty years, provided the said corporation or their successor shall, before the expiration of three years from the passage of this act, cause to be conducted the water from the said bayou or creek to the said city of Mobile in the manner hereinbefore proposed: And provided also, That after the expiration of the said term of years the said water works shall become the property of the said city and shall be for the use of the inhabitants thereof forever, provided also the said corporation shall
32 not carry the canal or ditch through the land of any person or persons without first obtaining from the owner, by purchase or otherwise, the privilege of doing so.

SEC. 4. And be it further enacted, That if any person whatsoever shall wantonly deface, remove, or otherwise injure or disturb the logs placed in the aforesaid canal or ditch, pipe or pipes of lead or other thing that may lead from the logs aforesaid, or shall remove from above the said logs any earth covering them, or shall obstruct or injure by logs, bushes, earth, or other materials the water of the said creek at any place between the source thereof and the place whence the water may be taken or conducted for the use of the said city as aforesaid, he, she, or they so offending for every such offense shall forfeit the sum of twenty dollars, to be recovered by ac-
33 tion of debt before any justice of the peace; one-half thereof shall go to the use of the said city of Mobile and the other half to the informer; and, moreover, such person shall be liable to pay also any particular damage that may be sustained thereby by the said corporation, and the informer is hereby declared a competent witness to prove any injury done as aforesaid.

SEC. 5. And be it further enacted, That it shall and may be lawful for the said corporation and their successors to take, demand, and receive from every private family a sum not exceeding one dollar per annum for each and every person, including servants and chil-

dren, of which said family may consist, in consideration of being supplied with water as is in this act provided; and for each and every public house or tavern the sum of twenty dollars in addition to the sum demanded of a private family; and for each and
34 every private boarding-house the sum of fifteen dollars in addition to the rate or sum aforesaid, to be paid half-yearly in advance: Provided, That no person shall be obliged to pay for any time that the water may be stopped, whether by accident or otherwise, and a proportionable deduction shall be made for all such time as aforesaid: And provided also, That no person shall be compelled to pay the sum or sums aforesaid who does not use, directly or indirectly, the water conveyed to said city as aforesaid.

SEC. 6. And be it further enacted, That it shall and may be lawful for the corporation aforesaid and their successors to demand, take, and receive for each and every pipe or hogshead of water conveyed to the city as aforesaid which may be taken for the use of ships or vessels any sum not exceeding seventy-five cents, and in like proportion for casks of smaller size.

35 SEC. 7. Be it further enacted, That any person or persons, inhabitants of said city, who shall use the water conveyed to the city as aforesaid, and shall not have declared his or her or their intention so to do nor have paid the sum or sums by this act authorized to be demanded and received—any such person so offending shall forfeit and pay double the sum he, she, or they would have been liable to have paid by the previous provisions of this act, to be recovered by action of debt before any justice of the peace, to the use of said corporation and their successors.

SEC. 8. Be it further enacted, That the said corporation shall put up or cause to be put up at least six hydrants, in six of the most convenient places within the said city, and also shall fix a like number of convenient places for use in case of fire, which
36 places shall be designated by the mayor and aldermen of said city; and the said hydrants shall be supplied with convenient and good cocks to facilitate the drawing of the water.

SEC. 9. Be it further enacted, That if any person or persons shall wilfully cut, mutilate, or otherwise deface or injure the said hydrants or any part thereof he, she, or they so offending shall pay a fine of twenty dollars, recoverable by action of debt before any justice of the peace, for the use of the corporation aforesaid; and if any person or persons shall carelessly or negligently leave the water running, or shall not stop the cock, for every such act he, she, or they, (or if a child) his or her parent or guardian, (or if a slave) his or her master, shall pay for every such act of carelessness or negligence the sum of two dollars, recoverable before a
37 justice of the peace at the suit of said corporation and to their use.

Approved Dec. 20th, 1820.

Filed April 25th, 1887.
(S'g'd) N. W. TRIMBLE, *Clerk.*

38 EXHIBIT "B" TO BILL.

Articles of agreement made and entered into the first day of December, in the year one thousand eight hundred and thirty-six, by and between "the mayor and aldermen of the city of Mobile," of the first part, and Henry Hitchcock, of the second part, witnesseth:

That the said "mayor and aldermen of the city of Mobile," for and in consideration of the rents, covenants, and agreements hereinafter contained, mentioned, and reserved on the part and behalf of the said Henry Hitchcock, his executors, administrators, and assigns, to be paid, kept, done, and performed, have granted, leased, demised, and to farm let, and by these presents do grant, lease, demise, and to farm let, unto the said Henry Hitchcock, his executors, administrators, and assigns, the entire use, control, man-
39 agement, rents, profits, issues, and enrollments of the "Mobile City Water Works," so called, embracing the grounds at Spring Hill, where the fountain is situated, and the ground along which the pipes pass from the said fountain to the said city of Mobile, together with the use of all the wooden and iron pipes and logs already laid down, consisting of about sixteen thousand feet of three-inch caliber and six thousand feet of six-inch caliber, as well as all the advantages which accrue to the said "mayor and aldermen" from, by, or under an act of the Legislature of the State of Alabama, entitled "An act to incorporate an aqueduct company in the city of Mobile, passed December 20th, 1820," and all ordinances and resolutions passed by the said "mayor and aldermen" under and by virtue of the said act or by the
40 act incorporating the said city of Mobile and the several acts amendatory thereto which in any way or manner relates to the said city "water works:"

To have and to hold the above mentioned and described premises, property, and privileges, together with all and singular the appurtenances unto the same belonging or in anywise appertaining, unto the said Henry Hitchcock, his executors, administrators, and assigns, from the day of the date hereof, for, during, and until the full end and term of twenty years thence next ensuing, and fully to be complete and ended, yielding and paying therefor, unto the said mayor and aldermen of the city of Mobile and to their successors in office the rent or sum of twenty-six thousand dollars in payment as follows, to wit: The sum of five thousand six hundred and sixteen dollars on the first day of December next; the
41 further sum of six thousand and thirty-two dollars on the first day of December, 1838; the further sum of six thousand four hundred and forty-eight dollars on the first of December, 1839; the further sum of six thousand eight hundred and sixty-four dollars on the first of December, 1840, and the further sum of seven thousand two hundred and fifty dollars on the first day of December, 1841; the first payment thereof to begin and to be made on the first day of December, 1837, for which said several sums or amounts of money the said mayor and aldermen hereby acknowl-

edge that they have received promissory notes for the respective amounts above stated and reserved, with endorsers to secure the payment thereof at the times above stipulated, which notes, when paid, will be in full for the rent aforesaid; and the said Henry Hitchcock, for himself, his heirs, executors, administrators, and
42 assigns, doth hereby covenant and agree, to and with the said party of the first part and their successors in office, that he will, during the said term hereby granted, well and truly pay or cause to be paid unto the said mayor and aldermen and their successors in office the rent above reserved at the times and in the manner and form hereinabove limited and appointed, without deduction, fraud, or delay, according to the true intent and meaning of these presents; and, further, that he will, during said term hereby granted, use and occupy the said premises and privileges in a careful and husband-like manner, without in any manner injuring or abusing the same (except to use and enjoy such part of the land and timber where the fountain is situated, as may be necessary for the alteration and repairing of the said "water works"); and, further, that he will, within the space of two years from
43 the date hereof, put the said water works in good and sufficient repair, so as to continue during the time hereby granted, and will also keep up the said water works in good order as they now are until they shall so be placed in good order and repair, so that the said city of Mobile and the inhabitants thereof may at all times be supplied with such quantity of good, wholesome water as may be procured through the said aqueduct; and, further, the said Henry Hitchcock covenants and agrees, as aforesaid, to surrender up the said "water works" and all the appurtenances thereto belonging unto the said mayor and aldermen or their successors in office in good order and condition at the expiration of the said term of twenty years from the date hereof, they, the said mayor and aldermen or their successors in office, paying to the said Henry Hitchcock,
44 his executors, administrators, or assigns, the amount which the said "water works" have actually cost him, the said Henry Hitchcock, his executors, administrators, or assigns, during said term of twenty years.

And, further, the said Henry Hitchcock covenants and agrees, at all times during the said term, to suffer and permit the said mayor and aldermen of the city of Mobile and their successors in office to use at least two hydrants to each square within said city where there are pipes laid down, as may be necessary for washing streets, and take therefrom as much water as may be necessary therefor, and in case of a conflagration of fire of buildings as much water as may be necessary from any and all parts of the said "water works;" and the said mayor and aldermen of the city of Mobile, for themselves and their successors in office, hereby covenant and agree (he, the said Henry Hitchcock, well and truly complying
45 with all and singular the foregoing stipulations and agreements on his part to be done, performed, and complied with) that he and his heirs, executors, administrators, and assigns shall and may retain the quiet possession of the said "water works" and

their appurtenances for the said term of twenty years without let, molestation, and hindrance of the said mayor and aldermen or their successors in office or any person or persons claiming by, through, or under them; and that the said Henry Hitchcock, his executors, administrators, and assigns, shall, during the said term of twenty years, have the exclusive privilege of furnishing to the citizens and inhabitants of the city of Mobile water from the aqueduct or water works aforesaid at a sum or price which shall at no time be less than the following rates, to be paid by the person or persons receiv-
46 ing the same and payable in advance, to wit: Twenty dollars for each family of six persons—first, for each person in private dwellings, including servants (and persons from one to twelve years of age to be estimated as two for one), two dollars per annum; secondly, for retail grocery stores, fifty dollars per annum each; third, for grocery stores where liquor is not retailed in quantities less than one quart, twenty-five dollars per annum; fourth, for dry-goods stores without families, twenty dollars each; fifth, for liquor stores doing the business of drawing off and bottling wine and other liquors, one hundred dollars each; sixth, for coffee-houses, one hundred dollars each; seventh, for oyster-houses, one hundred dollars each; eighth, for confectioneries, fifty dollars each; ninth, for a bath for a private family, five dollars each; tenth, for a horse, three dollars each; elev-
enth, for a carriage, three dollars each; twelfth, for the use of
47 ships, steamboats, vessels, and other water craft, per hogshead of 120 gallons, fifty cents each hogshead; thirteenth, *for* manufactories, hotels, taverns, boarding-houses, steam-mills, tan-yards, brick-yards, soda shops, livery stables, public baths, bakeries, dy-ing, scouring, and renovating establishments, not enumerated, may be supplied at an annual charge, according to the quantity of water that may be required, on such terms as the parties may agree, one hundred and twenty gallons for every twenty-four hours being estimated as the quantity consumed by a private family consisting of six grown persons, which said rates may be increased, raised, and regulated by the said mayor and aldermen of the city of Mobile or their successors in office, from time to time, as may be deemed necessary; and, further, he, the said Henry Hitchcock, his executors, administrators, and assigns, shall have the power to have, collect, and receive
48 from each and every person who shall take or receive water from the said water works the rates or prices per annum which may or shall be fixed and determined on by the said mayor and aldermen or their successors in office; and, further, shall have the power and authority to make such alterations and repairs upon the said works and to erect such new works and in such a manner as he may deem necessary and proper, and may at will change the fountain head and conduct the water from any part of the Three-Mile creek, so called, so that the same be good and wholesome, he, the said Henry Hitchcock, procuring at his cost the necessary ground for the reservoir or reservoirs and that through which the pipes shall pass.

And the said mayor and aldermen of Mobile, for themselves and their successors in office, hereby further covenant and agree that

they will, at the expiration of the said term of twenty years,
49 he, the said Henry Hitchcock, his executors, administrators, or assigns, delivering up the said "water works" and appurtenances in good order and repair, pay to him or them the actual cost and expenses which he or they shall have laid out and expended and which may be put upon the said works by him or them or any of them, either by reason of repairs or addition to the present works or by alterations or improvements made upon the said water works during the said term of twenty years above stated.

In testimony whereof the mayor of the said city of Mobile, in the name and by the authority of the said mayor and aldermen of the said city of Mobile, hath hereunto set his hand and seal of office, and the said Henry Hitchcock hath hereunto set his hand and seal the day and year first above written.

Filed April 25th, 1887.

(S'g'd) N. W. TRIMBLE, *Clerk.*

50 EXHIBIT "C" TO BILL.

An act to incorporate the Mobile Aqueduct Company.

SECTION 1. Be it enacted by the senate and house of representatives of the State of Alabama in General Assembly convened, That books of subscription for the capital stock of the "Mobile Aqueduct Company" shall be opened at the mayor's office, in the city of Mobile, on the first Monday in January next, at ten o'clock in the morning, and continue open from 10 a. m. to 3 o'clock p. m. from day to day (Sunday excepted) till the sum of $150,000.00 shall be subscribed; that said subscription shall be made under the superintendence of the mayor of the said city and any one of the aldermen, and, in the absence of the mayor, of any two of the aldermen of said city.

SEC. 2. And be it further enacted, That so soon as
51 $100,000.00 shall be subscribed the mayor of the said city shall shall notify the subscribers by giving ten days' notice thereof in one of the newspapers published in the said city of Mobile, at which time the said subscribers shall meet at the said mayor's office and choose by ballot a president and four directors, who shall serve until the first Monday in January next after their election and until their successors shall be duly elected, which shall be done annually on the first Monday in January, at the office of the company; but should no election be held on that day in any year the same may be held at any time hereafter on giving ten days' notice, as aforesaid, of the time and place by the president or any three of the directors or stockholders.

SEC. 3. And be it further enacted, That the said capital stock of said company shall be divided into shares of fifty dollars each, and that ten dollars on each share subscribed shall be paid at the time of subscribing, $15.00 in sixty days, $15.00 in one hundred
52 and twenty days, and $10.00 in one hundred and fifty days thereafter, unless the directors shall give longer, which shall

only be done upon receiving good security for the same; and should any subscriber fail to pay an installment as the same falls due the amount paid thereon shall be forfeited to the company and the stock so forfeited shall be resold as aforesaid.

SEC. 4. And be it further enacted, That from and after the first election, as provided by the 2d section of this act, the said subscribers shall constitute a body politic and corporate by the name and style of the "Mobile Aqueduct Company," and, as such, shall be taken, known, and held in law, and shall so continue until the first day of December, 1856, and until they shall have been purchased out by the corporation of the city of Mobile, as is hereinafter provided, during which period the said company shall have and enjoy
53 all the rights, privileges, and immunities which are contained in the act entitled "An act to incorporate an acqueduct company in the city of Mobile," passed the 20th day of December, 1820, which act, except as modified by this act, is hereby revived and declared to be in force during the continuance of this act.

SEC. 5. And be it further enacted, That the contract made and entered into by and between the mayor and aldermen of the city of Mobile and Henry Hitchcock on the first day of December, 1836, and which is recorded in the county clerk's office in Mobile, in which the said Henry Hitchcock became the lessee of the present city water works for the period of twenty years from the date thereof, be, and the same is hereby, recognized and confirmed, and upon the said Henry Hitchcock and his executors or administrators assigning the same to the company hereby incorporated, which he is
54 hereby authorized to do, the same in all its parts shall inure to the benefit of said company and the said company shall be subject to all the covenants contained therein to be performed by said Henry Hitchcock.

SEC. 6. And be it further enacted, That the said president and directors shall appoint a secretary and such other officers, engineers, and agents as they may think proper and the same to displace; they shall keep a journal and proper records of all their proceedings, which shall be subject to the inspection of the stockholders; a statement of the affairs of the company shall be laid before the stockholders at each annual election; semi-annual dividends of such portion of the profits as the directors shall think proper shall be declared and paid to the stockholders; the directors may make all needful rules and regulations relating to the management of the company and the supply of water, and they shall be permitted
55 the use of the streets in the city of Mobile free of charge for the purpose of laying down pipes for the conveyance of water.

SEC. 7. And be it further enacted, That the several incorporated banking and insurance companies in the city of Mobile, except the branch of the bank of the State of Alabama, at Mobile, be, and they are hereby, authorized to subscribe a sum not exceeding ten thousand dollars each towards the capital stock of said company.

SEC. 8. And be it further enacted, That so soon after the first day of December, 1856, as the said corporation of Mobile shall pay to the said company the cost of the said works, in conformity with their

contract, before referred to, with the said Henry Hitchcock, then this act shall cease to operate, and not before: Provided, That the said company shall have power to collect its debts and wind up its affairs.

Approved Dec. 25th, 1837.

Filed April 25th, 1887.
(S'g'd) N. W. TRIMBLE, *Clerk.*

56 EXHIBIT "D" TO BILL.

An act for the promotion of the health and convenience of the city of Mobile by the introduction into said city of a supply of wholesome water, to be used for domestic purposes and the extinguishment of fires.

SECTION 1. Be it enacted by the senate and house of representatives of the State of Alabama in General Assembly convened, That the agreement made and executed by and between the mayor, aldermen, and common council of the city of Mobile, on the one part, and Albert Stein, of the other part, bearing date the 26th day of December, A. D. 1840, be, and the same is hereby, fully confirmed.

Articles of agreement, made and entered into the 26th day of December, in the year one thousand eight hundred and forty, by and between the mayor, aldermen, and common council of the
57 city of Mobile, of the first part, and Albert Stein, of the second part, witnesseth:

That the said mayor, aldermen, and common council of the city of Mobile, for and in consideration of the covenants and agreements hereinafter contained, mentioned, and reserved on the part of the said Albert Stein, his executors, administrators, and assigns, to be paid, kept, done, and performed, have granted and by these presents do grant unto the said Albert Stein, his heirs, executors, administrators, or assigns, the sole privilege of supplying the city of Mobile with water from the Three-Mile creek for twenty years from the date of this agreement, as well as all the advantages and benefits which accrue to the said mayor, aldermen, and common council from, by, or under an act of the Legislature of the State of Alabama entitled "An act to incorporate an aqueduct company in the city of Mobile," passed December 20th, 1820, and all ordinances and
58 resolutions passed by the said mayor and aldermen of the city of Mobile under and by virtue of the said act or by the act of incorporation of the said city of Mobile and the several acts amendatory thereto which in any way or manner relate to the said city water works or the right to supply said city with water, as well as all the benefits and advantages which accrue to the said mayor, aldermen, and common council or the mayor and aldermen of the city of Mobile from, by, or under an act of the Legislature of the State of Alabama, entitled an act to incorporate the Mobile Aqueduct Company, passed December 25th, 1837; to have and to hold the above mentioned and described privileges, together with all and

singular the appurtenances unto the same belonging or in anywise appertaining, unto the said Albert Stein, his executors, administrators, and assigns, from the date hereof for, during, and until the full end and term of twenty years thence next ensuing.

59 And the said "mayor, aldermen, and common council of the city of Mobile," for themselves and their successors in office, hereby further covenant and agree that they will, at the expiration of the said term of twenty years (he, the said Albert Stein, his executors, administrators, and assigns, delivering up the said water works and appurtenances in good order and condition), pay to him, his executors, administrators, or assigns, their actual value, as determined by six arbitrators, three to be chosen by the mayor, aldermen, and common council of the city of Mobile and three by the said Albert Stein, his executors, administrators, or assigns, provided that the said arbitrators shall not be members of the corporation of the city of Mobile. If they agree and so report, in writing, their award shall be binding on the respective parties, but in case of disagreement the value of the works shall be left to the watering committee of the city of Philadelphia, by whatever name, as may be charged with the water works of said

60 city, whose decision and award, in writing, reported to the mayor, aldermen, and common council of the city of Mobile, shall be binding and conclusive. The amount so agreed upon shall be paid on the same day on which the said award shall be reported, and the water works and all appurtenances thereunto belonging shall be delivered over to the corporation of the city of Mobile by the said Albert Stein, his executors, administrators, or assigns.

And the said party of the first part hereby covenant and agree with the said party of the second part, his executors, administrators, and assigns, that he, his executors, administrators, and assigns, shall have quiet possession of the said works, during their erection and after they shall be completed, for the term of twenty years, and for any further time, until the said parties of the first part or

61 their successors in office shall redeem the said works from the said party of the second part, his heirs, executors, administrators, or assigns, according to the aforesaid stipulation.

And, further, that they shall, as soon as possible, obtain from the Legislature of the State of Alabama an act sanctioning this agreement and the stipulations thereof, as herein contained, with such other provisions as may be inserted by consent of the said parties.

And the said mayor, aldermen, and common council of the city of Mobile, for themselves and their successors in office, hereby covenant and agree (he, the said Albert Stein, his executors, administrators, and assigns, well and truly complying with all and singular the within stipulations and agreements on his part to be done, performed, and complied with) that he and his executors, administrators, and assigns shall and may retain quiet possession of the said water works for the said term of twenty years without let,

62 molestation, or hindrance of the said mayor, aldermen, and common council, or their successors in office, or any person or persons claiming by, through, or under them; and that the said

Albert Stein, his executors, administrators, and assigns, shall, during the said term of twenty years or any further time, until said works are redeemed, as above stipulated, have the exclusive privilege of supplying to the citizens and inhabitants of the city of Mobile water from the water works aforesaid, at the sum or price which shall at no time exceed the following rates, to be paid by the person or persons receiving the water, and payable in advance, to wit:

1st. For every family consisting of six persons, twenty dollars per annum, and two dollars for every person additional (and persons from one to twelve years of age are to be estimated as two for one).

2nd. For retail grocery stores where liquor is not retailed, twelve dollars per annum.

3rd. For retail grocery stores where liquor is sold in quan-
63 tities less than one quart, from twenty to fifty dollars per annum.

4th. For liquor stores doing the business of drawing off and bottling wine and other liquors, from thirty to seventy-five dollars per annum.

5th. For stores without families, offices, &c., twelve dollars per annum.

6th. For baths for private families, five dollars each per annum.

7th. For a horse, three dollars per annum.

8th. For a carriage, three dollars per annum.

9th. For the use of ships, steamboats, vessels, and other water craft, per hogshead of 120 gallons, fifty cents each.

10th. *For* coffee-houses, oyster-houses, confectioneries, manufactories, hotels, taverns, boarding-houses, steam-mills, tan-yards, brick-yards, soda shops, livery stables, public baths, bakeries, dy-ing, scouring, and renovating or other establishments not herein
64 enumerated may be supplied at an annual charge, according to the quantity of water that may be required, on such terms as the parties may agree upon.

And, further, the said Albert Stein, his executors, administrators, and assigns, shall have the power to collect and receive from each and every person who shall take and receive water from the water works the foregoing rates or prices per annum; and, further, shall have power and authority to conduct the water from any part of the "Three-Mile creek," so-called, so that the same may be good and wholesome, he, the said Albert Stein, his executors, administrators, or assigns, procuring at his or their cost the necessary ground for the reservoir, engine, and pump-house, and that through which the pipes shall pass.

And the said Albert Stein, for himself and his executors,
65 administrators, and assigns, doth hereby covenant and agree to and with the said party of the first part and their successors in office that he will introduce the water into the city of Mobile within the space of two years from the date hereof, so that the said city of Mobile and the inhabitants thereof may at all times be supplied with such a quantity of water as may be pro-

cured through the said pipes as far as they are laid; and, further, the said Albert Stein covenants and agrees, as aforesaid, to surrender up the said water works and all the appurtenances thereto to the said mayor, aldermen, and common council, or their successors in office, at the expiration of the said term of twenty years from the date hereof, they, the said mayor, aldermen, and common council, or their successors in office, paying the said Albert Stein the value of the works, determined as before mentioned.

66 And, further, the said Albert Stein covenants and agrees at all times during the said term of twenty years to suffer and permit the said mayor, aldermen, and common council of the city of Mobile and their successors in office to use two fire-plugs and no more at all times within said city where the pipes are laid down, as often as may be necessary for washing the gutters of the streets, and in case of a conflagration or fire of buildings as much water as may be necessary from any and all parts of the works; and, further, the said Albert Stein, for himself, his executors, administrators, and assigns, doth hereby covenant and agree to and with the said party of the first part that he will pay or cause to be paid unto the said mayor, aldermen, and common council, or their successors in office, for the pipes which they have on hand and those laid in the

67 ground which may be found fit for use, the same rates and prices and on the same terms as pipes of the same size and quality may be procured at, to be delivered in Mobile at the time when he, the said Albert Stein, may take into possession and use the said pipes now belonging to the said mayor, aldermen, and common council.

And, further, it is understood between the contracting parties hereto that as soon as the water is introduced under this agreement the present water works shall be abandoned and totally discontinued.

And, further, the said Albert Stein doth hereby covenant and agree to place and so arrange the fire-plugs that there shall be four fire-plugs to each square of ground where the pipes are laid.

It is further stipulated, understood, and agreed that the party of the second part, his executors, administrators, or assigns, will

68 grant to the corporation the use of the water for the city hospital and guard-house free of charge.

It is further agreed and understood between the parties hereto that if the party of the second part does not introduce the water into the city within two years from the date of this contract he will forfeit not only the privilege and advantages of this contract, but also all improvements and expenses that he may have incurred, the same to inure to the use and benefit of the city.

It is further understood and agreed between the parties hereto that the party of the second part hereby covenants and binds himself, his heirs, executors, administrators, and assigns, in the penal sum of ten thousand dollars, that he will commence the aforesaid works within one month after obtaining the consent of the Legislature of the State

of Alabama to the stipulations, agreements, and transfers
69 herein made and contained, and that he will prosecute said works to completion with due speed and diligence.

(Signed) EDWARD HALL, *Mayor.*
ALBERT STEIN,
Per pro LEWIS TROOST.

Attest:
[SEAL.] (Signed) H. P. ENSIGN, *Clerk,*
Per pro JNO. F. REMZ.

SEC. 2. And be it further enacted, That all the rights, powers, privileges, and immunities which were granted the Mobile Aqueduct Company and to the mayor and aldermen of the city of Mobile by an act of the General Assembly of the State of Alabama passed on the 20th day of December, 1820, not inconsistent with the terms of the before-mentioned agreement, be, and the same is hereby, granted, vested in, and confirmed to the said Albert Stein and assigns.

SEC. 3. And be it further enacted, That all the rights, powers,
70 privileges, and immunities which were granted to the Mobile Aqueduct Company and to the mayor and aldermen of the city of Mobile by an act of the General Assembly of the State of Alabama passed on the 25th day of December, 1837, not inconsistent with the terms of the before-mentioned agreement, be, and the same are hereby, granted, vested in, and confirmed to the said Albert Stein and his assigns.

SEC. 4. And be it further enacted, That the said Albert Stein and his assigns, by themselves and their agents, shall have full power and authority to use such of the public roads in the county of Mobile as may be in the direct route between the reservoir and fountain-head of the water works hereby to be erected and the city of Mobile for the purpose of laying the pipes for conducting the water into said city free from all charge or claim for damage therefor: Pro-
71 vided, That the said Albert Stein and his assigns shall, at their own proper cost and charge, keep and preserve any portion of any of the said public roads so used by them as aforesaid in full and complete repair so long as the same may be used by them as aforesaid.

SEC. 5. And be it further enacted, That the said Albert Stein and his assigns shall have full power and authority to dispose of any and all of the aforesaid privileges, rights, and immunities by deed, and that the said Albert Stein and his assigns may mortgage the said privileges, rights, and immunities by deed to all and every person whatsoever, and that the grantees of said Albert Stein and his assigns shall take and enjoy all and every right, privilege, and immunity which the said Albert Stein might or could enjoy by virtue of the aforesaid agreement and this act, whether the same be granted absolutely or by way of mortgage or pledge.

Approved January 7th, 1841.

Filed April 25, 1887.
(S'g'd) N. W. TRIMBLE, *Clerk.*

72 EXHIBIT "E" TO BILL.

The Police Board.

MOBILE, *July 5th*, 1883—12 m.

The police board met this day in regular monthly session, President Owen in the chair and Commissioners Henry, McNeil, Rich, and Russell present.

Committee No. 3 presented the following reports, which were received and action concurred in. The report was also adopted.

PORT OF MOBILE, *July 3rd*, 1883.

To the honorable board of police commissioners:

GENTLEMEN: Complaint having been made from time to time relative to the improper use of water by the different fire companies, and with the view of having an amicable adjustment of the
73 question, your committee No. 3 had a conference meeting on the 19th ult. (June), at which meeting there were present Recorder Owen, Messrs. Stein, Bragg, Kearney, and McNeill.

After an interchange of views it was concluded to ask Mr. Stein what would be the charge to each company for the use of water through a service pipe.

According to agreement entered upon on the 26th day of December, 1840, and which contract, by common consent of both parties, has been continued and observed, it is stipulated that the city of Mobile should have the right to use two fire-plugs and no more at one time for washing the gutters of the streets, and as much water as necessary in case of fire or conflagration, and full and free use of water for the city hospital and guard-house free of charge. This appears by the contract to be the terms and conditions agreed upon. It would thus appear that every family, organization, or party using water should pay for the same.

74 Your committee therefore offer for your consideration the following resolution:

Resolved, That on and after the 1st of July, 1883, the water works company be paid the sum of fifteen dollars per annum for each fire company using the water from service pipes.

Resolved, That from and after the above date the drawing of water from the fire-plugs be abandoned except in conformity with the terms of the contract, as above stated.

Respectfully submitted,
(Signed) DANIEL McNEILL, *Chairman.*

Filed April 25, 1887.
(S'g'd) N. W. TRIMBLE, *Clerk.*

75 EXHIBIT "F" TO BILL.

EXHIBIT B.

In the name of God, amen:

I, Albert Stein, of the county of Mobile, State of Alabama, being in feeble health, but of sound and disposing mind and memory, do make, publish, and declare this my last will and testament, hereby revoking and annulling all former wills by me at any time heretofore made:

As to my worldly estate and all the property, real and personal, of which I may die seized and possessed or to which I shall be entitled at the time of my decease, I devise, bequeath, and dispose thereof in the manner following, to wit:

First. My will is that all my just debts and funeral expenses shall by my executor hereinafter named be paid out of my estate as soon after my decease as shall by him be found convenient.

Item 1. I give, devise, and bequeath unto my grand-daughter "Carrie," daughter of my late son, Albert Stein, Junior, the
76 sum of three hundred ($300) dollars per annum, to be paid to her annually from the time of my decease until she shall have attained the age of twenty-one (21) years, by my executor hereinafter named, the same to be a charge upon my entire estate or the income thereof.

Item 2. It is my will that all my right, title, and interest in the Mobile City Water Works be held, managed, and controlled solely by my executor hereinafter named, and that the net annual income derived therefrom be divided equally among my five surviving children, viz: Alberta, wife of John S. Triplett; Frederick, Louis, Emma, and Ella, wife of Follin Davenport. For these services it is my will the executor hereinafter named receive an annual salary of two thousand (2,000) dollars, the same to be paid by the Mobile City Water Works.

Item 3. I give, devise, and bequeath my library, with all
77 books, papers, maps, manuscripts, drawings, and instruments of every kind and description thereunto pertaining, to my son, Louis Stein.

Item 4. It is my will that the furniture now in my possession formerly belonging to my daughter Alberta, wife of John S. Triplett, be restored to her, and I hereby release and relinquish all claims for advances heretofore made to my said daughter Alberta.

Item. It is my will that all the silverware and plate belonging to me be equally divided according to value between my daughters Alberta, Emma, and Ella.

Item 6. It is my will and I hereby devise and bequeath my piano manufactured by William Linderman & Son, of New York, to my daughter Emma, and my piano manufactured by Chickering, of Boston, to my daughter Ella, wife of Follin Davenport.

78 Item 7. It is my will that all the rest and residue of my property of every kind and description, wherever located, ex-

cept such as is hereinbefore and hereinafter otherwise disposed of, be divided equally between my surviving children, viz., Alberta, wife of John S. Triplett; Frederick, Louis, Emma, and Ella, wife of Follin Davenport.

Item 8. It is my will that all the property herein given, bequeathed, and devised unto my daughters Alberta, Emma, and Ella shall be for their sole and separate use, benefit, and behoof, respectively, freed and discharged from all debts or liabilities of the present or future husband of either or any of them.

Item 9. It is my will that the executor hereinafter named receive an annual salary of five hundred ($500) dollars in addition to the salary hereinbefore named as manager of the Mobile City
79 Water Works, the same to be paid from the proceeds of my estate and to be considered as in full compensation and precluding all other charges or commissions for the performance of his duties as executor of this my last will and testament; and, lastly, I hereby nominate and appoint my son, Louis Stein, to be the executor of this my last will and testament, and it is my will and desire that the said Louis Stein be released from all obligation or requirement to execute any bond or give any security for the performance of the same, solemnly committing it to his charge, before God and man, to execute the provisions hereof faithfully, honestly, conscientiously, and in accordance with these my last wishes and instructions.

In testimony whereof I, the said Albert Stein, have to this my last will and testament subscribed my name and affixed my seal this ninth day of July, in the year of our Lord one thousand eight hundred and seventy-four.

(Signed) ALBERT STEIN. [SEAL.]

80 Signed, sealed, published, and declared by the said Albert Stein as and for his last will and testament in the presence of us, who, at his request and in his presence and in the presence of each other, have subscribed our names as witnesses thereto:

THOS. McMILLAN.
JOHN C. DAWSON.
JOHN MURE.

Filed April 25, 1887.
(S'g'd) N. W. TRIMBLE, *Clerk.*

81 EXHIBIT "G" TO BILL.

An act to incorporate the Bienville Water Supply Company.

Whereas the inhabitants of the municipality known as the port of Mobile and the inhabitants of the village of Whistler, in the county of Mobile, are not provided with an adequate supply of water for domestic and municipal purposes; and whereas it is essential to the public health of the citizens of those towns and to the protection of their property and the public property therein against conflagration that an abundant supply of water should be introduced

and furnished to said citizens; and whereas a company of citizens of said county propose to undertake the duty of furnishing such supply to said towns for the public use and benefit:

SECTION 1. Be it enacted by the General Assembly of Ala-
82 bama, That George A. Ketchum, Thomas Henry, Wm. Butler Duncan, William J. Harrow, P. Hamilton, Julien W. Whitney, David R. Dunlap, A. F. Cawthorn, Dan'l P. Bestor, their associates and successors be, and the same are hereby, made a body politic and corporate by the name and style of the Bienville Water Supply Company, and as such corporation they are hereby vested with all the powers and privileges of private corporations under the laws of this State.

SEC. 2. Be it further enacted, That the capital of said corporation shall be five hundred thousand dollars, divided into shares of one hundred dollars each, and that said corporation may, by purchase or otherwise, acquire and own any and all real estate and personal property which may be necessary in order that said corporation may successfully engage in and carry on the business of water supply hereinafter specially declared; and that any insurance, banking, or other corporation existing under the laws of
83 this State shall have power and is hereby authorized to subscribe for, own, and hold as many shares of the capital stock of the corporation hereby created as said corporations, by their boards of directors or managers, may see fit to subscribe for.

SEC. 3. Be it further enacted, That the business and affairs of the corporation hereby created shall be managed by seven directors, to be elected annually by the shareholders of said corporation at such time and place as may be directed by the by-laws thereof; that one of their number shall be elected by said directors to be president of said corporation, whose powers and duties shall be as by their said by-laws declared.

SEC. 4. Be it further enacted, That the officers of said corporation shall be the said president and a secretary, the latter to be elected by said directors, and such other officers as said corporation, by its directors, may deem to be necessary for the successful man-
84 agement of its business; said directors may require of all officers except the president bond, with satisfactory security, in such sum as may be prescribed by the by-laws of said corporation, conditioned for the faithful performance of the duties required of them by said by-laws and resolutions of the board of directors.

SEC. 5. Be it further enacted, That until a board of directors be elected by the shareholders, as herein directed, any five of the corporators hereinbefore named or of their associates shall be authorized to open books in the port of Mobile or elsewhere, as they may direct, for subscription to the capital stock of such corporation upon such terms as to payment by the subscribers thereof as said five persons may by resolution determine, to be placed at the head of the subscription list. When the sum of fifty thousand dollars shall have been subscribed, said corporation who have obtained such subscription shall call a meeting of the subscribers at such time and place
85 as they may appoint. At such meeting said subscribers shall elect a board of seven directors, to serve one year and till

their successors are elected, who shall proceed and organize said corporation upon filing with the judge of probate of Mobile county a certificate of organization, as herein directed, signed by the persons who superintended the subscriptions to the stock, or a majority of them. Said corporation may enter upon and thereafter transact and carry on the business hereby authorized to be transacted and carried on by said corporation.

SEC. 6. Be it further enacted, That said corporation is hereby charged with the duty of introducing into the port of Mobile and the village of Whistler, in Mobile county, such supply of pure water as the domestic, sanitary, and municipal wants thereof may require; and for this purpose said corporation is hereby authorized to con-
struct all needed canals and ditches, and, by pipes and aque-
86 ducts as may be found best suited for the purpose, to carry into said towns, by such line or route as may be found best, such water as may be needed, from any point in said county within twenty miles of said port or city of Mobile. In the laying of its pipes and the construction of aqueducts when required said corporation is hereby authorized to use, free of charge, any and all public roads of the county and streets of said towns, free of charge; but when its pipes are laid in or under said roads and streets, or its other works completed, said corporation shall, without delay, restore said roads and streets to their original condition for use as public highways and thoroughfares, and for the purpose herein and hereby authorized, and to perform the public duty hereby declared and, by the acceptance of this charter, imposed upon it. Said corporation shall have the right to enter upon any land of private persons, and,
therein and beneath the surface thereof, to lay pipes for the
87 conveyance of said water, and thereafter to repair and maintain the same, but said corporation shall not enter upon any private lot in said towns without the consent of the owner thereof, and before entering on any private property must first pay to the owner thereof such reasonable compensation for its use of said land for the purpose herein declared as may be agreed upon with said owner; or, in case of disagreement, as may be ascertained upon proceedings for that purpose, as directed by law, for the condemnation of private property or the use thereof to public use.

SEC. 7TH. Be it further enacted, That for the supply tubes or pipes leading from the main or large pipes in the streets or roads to the houses or other places where the water is required for use and for the hydrants and other appliances connected therewith said cor-
poration shall be entitled to have and demand from the per-
88 son or persons requiring the water the reasonable cost thereof and of fixing and adjusting the same, and said corporation shall have authority to make all needful rules and regulations relating to the supply and use of said water.

SEC. 8. Be it further enacted, That said company may contract with the owner or owners of any land through or over which its water routes may run for the purchase of so much of said land or of the use thereof as may be requisite for the purposes of said company. If any land or lands shall belong to a person or persons under age

or *non compos mentis*, or to a trust estate or to an estate under administration by an executor or administrator, the guardian, trustee, executor, or administrator, as the case may be, may contract with the company for the purchase by said corporation of said land or lands or the use thereof as may be needed by said corporation for
89 the purpose authorized by this act, and upon consummation of such contract may sell and convey said land or lands or the use thereof to said corporation. If said corporation cannot agree with the owners or the parties authorized to sell the property desired to be acquired, then said corporation may proceed to obtain and may acquire the property or interest so desired in the mode prescribed by law for the taking of private property for the use of other persons or for public use.

SEC. 9. Be it further enacted, That the said corporation hereby created is hereby invested with all the rights and powers which by law or contract was vested in the late municipal corporation known as "The mayor, aldermen, and common council of the city of Mobile," by redemption, purchase, or otherwise, to acquire from any and all other persons, corporations, or associations whatever
90 any and all property and rights by such person or persons, corporations, or associations held under any former contract or law whatever for the introduction and supply of water into the city of Mobile or the inhabitants thereof, and for such purpose said Bienville Water Supply Company shall be held and taken to be the assignee of the said "mayor, aldermen, and common council of the city of Mobile," and may proceed to assert said rights and exercise said powers thus assigned the same as could have been done by the municipal corporation aforesaid, and for this purpose the commissioners of Mobile, appointed under and by virtue of "An act to vacate and annul the charter and dissolve the corporation of the city of Mobile," approved February 11th, 1879, are hereby authorized, on the demand of said corporation, to release to said corporation all the rights of said late city of Mobile in and to such right
91 of redemption, purchase, or other acquisitions of such property or rights.

SEC. 10. Be it further enacted, That said Bienville Water Supply Company be, and is hereby, authorized to acquire, by contract with any person or persons, corporation, company, or association claiming any right to supply the port or city of Mobile or the inhabitants thereof with water, such right or rights as he or they may have in the premises and the property owned and used in connection therewith, and pay therefor such amount of money as may be agreed upon or such amount as may be agreed upon in stock of the said supply company; and in case of failure by contract to obtain such right and property, then said corporation hereby created may proceed, as directed by law for the condemnation and the taking of private property for public use, to obtain the same for the purpose of the public use and benefit herein declared of furnishing the port
92 of Mobile and the village of Whistler and the inhabitants thereof with an adequate supply of water for domestic, sanitary, and municipal purposes.

SEC. 11. Be it further enacted, That said corporation shall have and enjoy the exclusive right of conducting and bringing water from any point other than Three Mile creek, in the county of Mobile, for the supply of said port and village of Whistler for the period of twenty years from the time when said water shall have been brought within the limits of the port of Mobile and be ready for distribution and supply to the inhabitants of the port of Mobile and the houses and dwellings within the limits of said port and till the municipal authorities of said port and village, if so by law authorized, shall purchase the water works and property of said corporation, as hereinafter provided, but said corporation, within four years from the passage of this act, must begin its
93 works and within six years from the date of the passage of this act must cause water to be conducted into the port of Mobile from some stream, point, or place as hereinbefore named, and if and when any existing claim to conduct water into Mobile from Three-Mile creek or any other point without the limits of said port has been obtained by this corporation, then said corporation shall have the exclusive right to supply said port and village and the inhabitants thereof with water for the period and the term aforesaid; but nothing in this act shall be construed to prohibit *to* organization hereafter of any company for the purpose of supplying the city of Mobile or any other place with water which does not interfere with the property rights or rights of obtaining water pertaining to this company. In making contracts for labor and materials in the construction of works by this act authorized said corpora-
94 tion, by its directors, *are* hereby empowered to stipulate for payment, in whole or in part, by the issue of shares of capital stock of said corporation to said contractors, but in no event shall the issue of certificates — capital stock exceed the amount of capital hereinbefore authorized.

SEC. 12. Be it further enacted, That after the expiration of said period of twenty years, in case the General Assembly of Alabama so authorize the corporate authorities then existing for the government of the territory now known as the port of Mobile, the said corporate authorities may then purchase the property and rights of said corporation, on such terms as may be agreed upon, on a valuation to be made by five referees, two to be appointed by said municipal authorities, two by the Bienville Water Supply Company, and one to be selected by the other four referees; but none of said referees shall be residents of the county of Mobile.

95 SEC. 13. Be it further enacted, That said corporation, for the purpose of its creation, may borrow money and issue its bonds therefor, and for the payment of the same may mortgage its property and franchises on such terms as it may contract, but not at a rate of interest in excess of that authorized by the laws of this State.

SEC. 14. Be it further enacted, That said corporation be, and the same is hereby, authorized to demand and receive for compensation for the supply of water it may furnish at not exceeding the following rates, to be paid by the person receiving the water, and in ad-

vance—that is to say, for every family consisting of six persons or less, not more than twenty dollars per annum, and two dollars per annum for every person additional, two children under twelve years of age to be estimated as two for one; for retail grocery stores where liquors are not retailed, twelve dollars per annum; for retail
96 grocery stores where liquor is retailed, from twenty to fifty dollars per annum; for liquor stores doing the business of drawing off and bottling wines or other liquors, from thirty to seventy-five dollars per annum; for stores without families and for offices, twelve dollars per annum; for baths for private families, five dollars per annum; for a horse, five dollars per annum; for a buggy or carriage, three dollars per annum; for the use of ships and steamboats, vessels, and other water crafts, per hogshead of one hundred and twenty gallons (50c.) fifty cents per hogshead. Coffee-houses, oyster saloons, confectioneries, manufactories, hotels, taverns, boarding-houses, steam-mills, tan-yards, brick-yards, soda-water stands, livery stables, public baths, public or private fountains, baking, dyeing, scouring, and renovating establishments, and other places of business not herein enumerated may be supplied at an annual
97 charge, according to the quantity of water which may be required, on such terms as may be agreed upon.

SEC. 15. Be it further enacted, That said corporation must, without charge, supply all needed water for the use of municipal buildings and hospitals of said port, and the jail and the court-house of the county, but shall be entitled to have and demand reasonable and proper compensation for all pipes, hydrants, and labor necessary to carry the water from the main passing said building to the point where the water is to be used.

SEC. 16. Be it further enacted, That whenever the owners of three-fourths of the improved property of any square in said port, in writing, so demands, said corporation must place on such square as many fire-plugs as may be so demanded, at such rate as may be agreed upon for each plug, and the payment of the annual compensation so contracted for shall be a lien upon the improved property
98 of such square and be divided among and between the buildings upon such square in proportion to their respective values as the same are assessed upon the tax-books of said port or city, and the proportion so assessed to said buildings, respectively, shall be collected for the use of the corporation and paid to it by the tax-collector of the port or city when he makes collection of the taxes levied for municipal purposes. Said fire-plugs shall be placed upon the street, readily accessible to the firemen, for use in case of fire; said plugs may be opened for the purpose of washing the streets and gutters when and for such time as the municipal authorities may by ordinance direct. For the water so used in case of fire and for washing and sanitary purposes no additional payment shall be made to said corporation; and the Bienville Water Supply Company and the municipal authorities of the port
99 or city of Mobile may contract with each other, on such terms as they can agree upon, for the employment by said company of apparatus or appliances of their own in connection with

its said water works for the extinguishment of fires or for other public uses, but the existing police board shall not, by anything in this act contained, be empowered to levy, demand, or collect any other or additional taxes than they are now by law empowered to levy, demand, and collect.

SEC. 17. Be it further enacted, That any person who shall wilfully remove, disturb, break, or otherwise injure or damage the water works of said company or anything appertaining thereto, including the logs, pipes, reservoirs, or other things connected therewith, or remove from, under, or about them any earth or other material, or by logs, brush, or other thing obstruct or devert therefrom the waters thereof or of the streams or fountains from which
100 they are supplied, or shall wilfully deposit or cause to be deposited any unwholesome or offensive substance or matter in the reservoirs or pipes of said company or in the streams supplying the same, or shall tap or open a communication or cause the same to be done into the street pipes or other pipes for the conducting of water otherwise than by authority of said company or of its lawful agent, thereunto authorized, shall, for each such offense, be subject to prosecution in the city court or the circuit court of Mobile county, and be fined in a sum not exceeding five hundred dollars and be imprisoned in the county jail or sentenced to hard labor for the county not exceeding two years, at the discretion of the jury trying the cause, and shall besides be liable to the company for all damages it may sustain thereby.

Approved February 19, 1883.

Filed April 25, 1887.
(S'g'd) N. W. TRIMBLE, *Clerk.*

101 *Subpœna in Equity.*

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama, at Mobile. In Equity.

LOUIS STEIN, Executor, &c., Complainant,
vs.
THE BIENVILLE WATER SUPPLY COMPANY, Defendant. } 150.

The President of the United States of America to the Bienville Water Supply Company, a corporation incorporated by a special act of the Legislature of the State of Alabama, and which is a citizen of the district aforesaid and of the State of Alabama, Greeting:

You are hereby commanded and strictly enjoined that,
102 laying all other matters aside, and notwithstanding any other excuse, you personally be and appear before the judge of the circuit court of the United States for the fifth judicial circuit and southern district of Alabama, at Mobile, at the clerk's office of the said court in the city of Mobile, at rules to be had on the first Mon-

day of June (being the 6th day of said month) next, to plead to, answer, or demur to a bill of complaint exhibited against you in the said court by Louis Stein, as executor of the estate of Albert Stein, deceased, who is a citizen of the State of Alabama, and to do further and receive what the said court shall have considered in that behalf, and this you are not to omit; and have there then this writ.

To the marshal of the United States for the said district to execute.

103 Witness Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Mobile, this the 25th day of April, in the year of our Lord one thousand eight hundred and eighty-seven.

Attest:

[SEAL.] (S'g'd) N. W. TRIMBLE, *Clerk, &c.*

NOTE.—The defendant is required and hereby notified to enter appearance in the above-entitled cause in the clerk's office of said court, in the custom-house building, in the city of Mobile, on or before the rule day next ensuing, to wit, the first Monday of June, anno Domini 1887, or the bill may be taken for confessed against them.

(S'g'd) N. W. TRIMBLE, *Clerk, &c.*

L. H. FAITH,
Complainant's Solicitor.

Issued this 25th day of April, A. D. 1887.

N. W. TRIMBLE, *Clerk.*

104 *Marshal's Return of Subpœna.*

Received in office this 25th day of April, A. D. 1887.

WM. W. ALLEN,
U. S. Marshal.

Executed by serving copy of the within subpœna on the Bienville Water Supply Company by leaving a copy of the subpœna with Dr. Geo. A. Ketchum, president of said company, and by showing him the original thereof, this 25th day of April, A. D. 1887.

(S'g'd) WM. W. ALLEN,
U. S. Marshal,
By RICH'D FELDER, *Deputy.*

Marshal's fees:

Serving copies (one)------ $2 00
Mileage ---------- ----

Paid Ap'l 25, '87.

Returned & filed April 29th, 1887.

(S'g'd) N. W. TRIMBLE, *Clerk.*

105 *Appearance for Def'd't.*

In the Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama. In Equity.

LOUIS STEIN, Executor, Compl't,
vs.
BIENVILLE WATER SUPPLY COMPANY, Def't. } 150.

We appear for the defendant in the above-entitled cause in the circuit court of the United States for the southern district of Alabama.

Mobile, June 6, 1887.

(S'g'd) HAMILTONS, OVERALL & BESTOR,
Att'ys-at-Law & Solicitors in Chancery.

Filed June 6th, 1887.

(S'g'd) N. W. TRIMBLE, *Clerk.*

106 *Entry on Rule Book as to Entering Appearance for Def'd't.*

In the Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama. At Rules. In Equity.

LOUIS STEIN, as Ex'r, &c.,
vs.
BIENVILLE WATER SUPPLY CO. } 150.

In this cause Messrs. Hamiltons and Overall & Bestor come and enter their appearance for the defendant, The Bienville Water Supply Company, this 6th day of June, A. D. 1887.

(S'g'd) N. W. TRIMBLE, *Clerk.*

107 *Demurrer to Bill.*

In the Circuit Court of the United States for the Southern District of Alabama. In Equity.

LOUIS STEIN, as Executor of Albert Stein, Deceased, Complainant,
vs.
THE BIENVILLE WATER SUPPLY COMPANY, Defendant. } 150.

The defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is therein fet forth and alleged, doth demur to the said bill, and for cause of demurrer showeth:

First. That the said bill of complaint, in case the same were true, which this defendant in nowise admits, contains not any matter of equity whereon this court can ground any decree or give the
108 complainant any relief or assistance as against this defendant.

Second. If the allegations of said bill were true they would amount to showing that complainant has the privilege of supplying the city of Mobile and the inhabitants thereof with water from Three-Mile creek only.

Third. According to the allegations of said bill, the complainant's privilege or franchise was limited to the supplying of water from Three-Mile creek, and he had and has this exclusive privilege or franchise and no other, and defendant has not contemplated or threatened and is not contemplating or threatening to interfere with this right.

Fourth. Because the exclusiveness of the complainant's grant, according to the allegations of the complainant's bill, was and is limited to the supply of water from Three-Mile creek.

109 Fifth. Because, according to the allegations of the bill, the defendant has not proposed and does not propose to supply water from Three-Mile creek, but from another source, and does not propose to interfere in any way with complainant's right to supply water from Three-Mile creek.

Sixth. Because, according to the allegations of the bill, the acts of the Legislature granting the privilege or franchise under which complainant claims show they were granted for the benefit of and advantage to the health of the city of Mobile, and exclusive grant was thereby given by the law-making power to interfere with, prevent, or obstruct other legislation in regard to the promotion of the health of citizens, and the power of the Legislature to alter or change by subsequent legislation laws in regard to health was not taken away or destroyed by the earlier legislation.

110 Seventh. Because a law for the benefit of health or morals cannot be exclusive, so that it cannot be impaired or changed by subsequent legislation; and yet, according to the allegations of the bill, the one in regard to the complainant's franchise was one in regard to and conducive to the good health of the citizens of Mobile, and the legislation under which the defendant is alleged to claim was also enacted in part in order to promote the health of the citizens of the port or city of Mobile.

Eighth. The furnishing of an ample supply of wholesome water for the city of Mobile and to the inhabitants thereof is a matter which concerns the public health, and the regulation thereof and legislation on and in regard to such supply cannot be conclusive or for the sole use of any person or corporation; hence, according to the allegations of the bill, the complainant cannot have a con-

111 tract, such as is thereof alleged, which cannot be changed or altered by future legislation or grants such as defendant has.

Ninth. Because, according to the allegations of the bill, the complainant has a complete remedy at law.

Tenth. Because, according to the allegations of the bill, the act under which defendant holds and claims its franchise and privileges to compete with complainant in supplying the city of Mobile and its inhabitants with water fixes the manner of ascertaining the money value of complainant's property and rights, which sum, as

damages or values, can be ascertained by a suit at law, whatever it may be or prove to be.

Eleventh. If the allegations of the bill were true, which is not admitted, this would not authorize the complainant to interfere or to apply to this court to interfere with the right of the defendant to furnish water to the city and citizens of Mobile from any source other than the waters of the Three-Mile creek.

112

Twelfth. It appears from the allegations of the bill of complaint that the complainant had not, at the time when said bill was filed, and has not now, any exclusive right to furnish water to the city of Mobile or its citizens excepting from the Three-Mile creek, and it is not alleged in said bill that the defendant has at any time proposed or does propose to interfere with any such right.

Thirteenth. It appears from the allegations of the bill that the complainant had not at the time when said bill was filed, and has not now, any exclusive right to furnish water to the city of Mobile or its inhabitants excepting from the water works of the said complainant, and it is not alleged in said bill that the defendant has at any time proposed or is now proposing to interfere with any such right.

113

Fourteenth. It appears from the allegations of the bill that the claim of the complainant to supply water to the city of Mobile and the inhabitants thereof at certain specified prices, as stated in the said bill and the exhibits thereto, to be paid to the complainant, has long since expired, and the only right which the said complainant has now, or had at the time of the filing of the bill, or at any time since, to furnish water to the said city of Mobile or the inhabitants thereof was to furnish the same free of charge; and it further appears from the allegations of the bill that the defendant is not interfering or proposing to interfere, and has not interfered or proposed to interfere, with any right of the complainant in any way of which said complainant has a right to complain in this suit.

114

Fifteenth. According to the allegations of the bill it appears that in the enactment of the charter of the Bienville Water Supply Company, a copy of which is attached as an exhibit to the bill, the General Assembly of *of* the State of Alabama did not go beyond its legitimate power in legislating for the protection of the health of its citizens, but acted in a manner and to an extent which were within the scope of its authority.

Wherefore, and for divers good causes of demurrer appearing in the said bill, the defendant demurs thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

115

(S'g'd) HAMILTONS, OVERALL & BESTOR,
Sol'rs for Def't.

UNITED STATES OF AMERICA, *Southern Dist. of Alabama:*

The undersigned, attorneys-at-law and solicitors in chancery and of counsel for the Bienville Water Supply Company in the before-entitled cause, hereby certify that, in our opinion, the foregoing demurrers are well founded in point of law.

(S'g'd) THOS. A. HAMILTON.
D. P. BESTOR.

UNITED STATES OF AMERICA, *Southern Dist. of Alabama:*

Before me, S. P. Gaillard, a notary public, personally appeared George A. Ketchum, president of the Bienville Water Supply
116 Company, and, upon his oath, saith that the foregoing demurrers are not interposed for delay in the case of Louis Stein, executor, against the Bienville Water Supply Company.

(S'g'd) GEO. A. KETCHUM.

Subscribed & sworn to before me this 4th day of June, A. D. 1887, as witness my hand & official seal.

[Seal of Notary Public.]

(S'g'd) S. P. GAILLARD,
Notary Public for Mobile Co., Ala.

Filed June 9th, 1887.

(S'g'd) N. W. TRIMBLE, *Clerk.*

117 *Entry on Rule Book as to Filing of Demurrers.*

In the Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama. In Equity.

LOUIS STEIN, Ex'r, &c.,
vs.
BIENVILLE WATER SUPPLY CO. } 150.

In this cause come the defendant's solicitors and file demurrers to the bill of complaint this 9th day of June, 1887.

(S'g'd) N. W. TRIMBLE, *Clerk.*

118 *Entry on Rule Book Setting Demurrers Down for Argument.*

In the Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama. In Equity.

LOUIS STEIN, Ex'r, &c.,
vs.
THE BIENVILLE WATER SUPPLY COMPANY. } 150.

Now comes the complainant, by his solicitor, and sets the demurrers of defendant down for argument.

June 25th, 1887.

(S'g'd) L. H. FAITH,
Sol'r for Complainant.

119 United States Circuit Court, Southern District of Alabama. December Term, 1887.

LOUIS STEIN, as Ex'r, &c.,
vs.
THE BIENVILLE WATER SUPPLY CO.

TOULMIN, *Judge:*

This bill of complaint is brought by the executor of Albert Stein, deceased, as the proprietor of what is known as the Stein Water Works in Mobile, to enjoin the Bienville Water Supply Company from laying its pipes in or through the streets of the city of Mobile for the purpose of furnishing water through the same to the inhabitants of said city, and from conducting water into said city for the supply of its inhabitants for domestic and municipal purposes, on the claim of an exclusive right in the complainant to furnish that supply.

The defendant is a corporation of the State of Alabama under an act of incorporation approved February 19th, 1883, and amended February 4th, 1885. By its act of incorporation the defendant is charged with the duty of introducing into the city of Mobile such supply of pure water as the domestic, sanitary, and municipal wants thereof may require. For this purpose power is given to it to acquire lands and use the public roads and streets of the said city wherein to lay its pipes. It is also authorized to make and maintain proper canals, ditches, pipes, and aqueducts from any point in the county of Mobile within twenty miles of the city of Mobile, and there is given to it the exclusive right of conducting and bringing water into said city from any point other than Three-Mile creek in said county for the period of twenty years from the time when water so brought by it is ready for distribution within the limits
120 of said city. The duty is imposed on the corporation of beginning the construction of its works, and of having them ready for distribution of water to the citizens of said city within a time limited by the act of incorporation.

The claim of the complainant is that he has the exclusive right to supply the city of Mobile with water from all sources, and that any attempt by the defendant to introduce water into said city from any source whatever is an infringement of his rights which should be enjoined. He asserts that his rights are interfered with by the defendant in laying down pipes and mains for the purpose of conducting water into said city; but it is not averred that the defendant proposes to conduct and bring water from the Three-Mile creek.

To entitle the complainant to the relief prayed for in the bill he must show in himself a clear and indisputable right for the exclusive supply of water by him to the city of Mobile and its inhabitants from any and all sources. His right rests on a contract made by his testator, Albert Stein, with the city of Mobile on December 26th, 1840, as confirmed by act of the General Assembly of Alabama, approved January 7th, 1841.

It seems from the legislation on the subject that before that time sundry attempts had been made to bring water into the city from the Three-Mile creek by means of corporations chartered for that purpose, but it does not appear that at the time of the agreement with Stein any of said corporations were in existence, or had ever been organized. By act of the General Assembly of December 24th, 1824, the charter of the first "aqueduct company," which had been authorized by act of December 20th, 1820, was declared to be null and void by reason of the corporation not having complied with the conditions of its charter, and whatever privileges it had were de-
121 clared to be vested in the city corporation.

The period of its privileges was to be for forty years, provided that before the expiration of three years from the date of its charter it had caused to be conducted the water from the said Three-Mile creek to the city of Mobile in the manner prescribed in the act of incorporation.

The act further provided that after the expiration of the said term of forty years the water works of the said "aqueduct company" should become the property of the said city for the use of the inhabitants thereof. These forty years of privilege expired in December, 1860.

It appears that in December, 1836, the city of Mobile, having become the owner of the property connected with the water system, contracted with one Hitchcock to lease the same to him for a term of twenty years, and he was thereafter to supply water to the city. By act of December 25th, 1837, the contract between Hitchcock and the city was confirmed and another aqueduct company was authorized to be organized and the Hitchcock interest merged in it. This corporation was to take Hitchcock's place. It was to have the rights and privileges of the former aqueduct company and to continue a corporation after its organization with these rights until the first of December, 1856, and until they shall have been purchased out by the city of Mobile in conformity to the contract with said Hitchcock of December first, 1836. Whether this company ever organized or not does not appear, but it does appear that the city of Mobile had become the owner of the water works before the contract was made with Stein in 1840. So it seems that, at the time the contract with Stein was made, this aqueduct company of 1837 had in some manner been purchased out by the city. The charter of the aqueduct company under the act of 1820 had been vacated
122 and annulled; that of the original term of privileges or monopoly (which was forty years) only twenty years still remained; that the privileges of the charter of 1820 were revived to the aqueduct company by the act of 1837 for the term of twenty years and until they shall have been purchased out by the city; that when the contract with Stein was made the property of the aqueduct company had all been acquired by the city, and that all the privileges of that company had at at that time ceased. The city then was in a position to contract with Stein for the supply of its inhabitants with water. It had, however, no power to contract with

him for the exclusive right of supplying the city with water without the sovereign authority of the State.

Birmingham and Pratt Mines St. R'y Co. *vs.* Birmingham St. R'y Co., 79 Ala., 465, and numerous anthorities cited therein.

Saginaw Gas Light Co. *vs.* City of Saginaw, 28th Fed. Rep., p. 534.

It does does not appear that it had such authority, but in December, 1840, the agreement with Stein was made by which was granted to him "the sole privilege of supplying the city of Mobile with water from the Three-Mile creek for twenty years from the date of the agreement," and this agreement was fully confirmed by act of the General Assembly of January 7th, 1841.

The claim asserted by complainant, as before said, is that he has the exclusive right to supply the city of Mobile and its inhabitants with water from any and all sources, and he bases this claim on the agreement of December 26th, 1840, and the act confirmatory thereof, of January 7th, 1841.

The principle is that no franchise which is granted by the State is ever construed to be exclusive, whether it be in the nature
123 of a contract or not, unless it be so declared in clear terms, or be necessarily implied, "or unless the terms of the grant render such construction imperative" (as some writers express it).

Birmingham & Pratt Mines St. R'y Co. *vs.* Birmingham St. R'y Co., 79 Ala., 472.

1 High on Injunctions, 902.

Cooley's Const. Lim., 495 (Mar., p. 395).

"No rule is better settled than that charters of incorporation are to be construed strictly against the corporators. The just presumption in every such case is that the State has granted in express terms all that it designed to grant at all. In the construction of a charter, to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation."

Penn. R. R. Co. *vs.* Canal Commis., 21 Penn. St. R., 22.

Chenango Bridge Co. *vs.* Binghamton Bridge Co., 3 Wallace, 51.

Mills *vs.* St. Clair Co., 8 How., 569.

And this rule is not confined to the grant of a corporate franchise, but it extends to all grants of franchises or privileges by the State to individuals, in the benefits of which the people at large cannot participate.

Cooley's Const. Lim., 496 (M., p. 396).

The grant, then, of the Stein Water Works is not only to be construed strictly against the grantee, but it will not be held to exclude the grant of a similar and competing privilege to the Bienville Water Supply Company unless the terms of the grant to Stein render such construction imperative.

Let us now apply these rules of construction to the agreement and confirmatory act under which Stein's claim is asserted.

The agreement is declared to witness that the mayor, &c. (the corporate name of the city), in consideration of the cove-
124 nants and agreement therein contained, &c., &c., have granted, and by these presents do grant, unto Albert Stein, his heirs, executors, &c., the privilege of supplying the city of Mobile with water from the Three-Mile creek for twenty years from the date of the agreement, as well as all the advantages and benefits which accrue to the said mayor, &c., from, by, and under "An act to incorporate an aqueduct company in the city of Mobile," passed December 20th, 1820, * * * as well as all the benefits and advantages which accrue to the said mayor, &c., by or under an act, &c., entitled "An act to incorporate the Mobile Aqueduct Company," passed December 25th, 1837, * * * during and until the full end and term of twenty years next ensuing. Then comes the covenant on the part of the city that, at the expiration of said term of twenty years, it would pay to said Stein & Co. the actual value of his water works, to be ascertained in a manner pointed out in the agreement.

It is contended by complainant that the contract should be construed to accomplish the intention of the parties, and to ascertain that intention regard must be had to the nature of the instrument itself and the object which they had in view; and if, by fair construction given to the words used, either singly or in connection with the subject-matter, that intention can be clearly ascertained, effect should be given to it; and the contention is that the subject-matter and object of the contract was the supplying the city of Mobile with pure, wholesome water, and that the intention of the parties to the contract was to grant to Stein the "exclusive privilege and right" to conduct and bring water to the city of Mobile for the supplying of the inhabitants thereof without restriction as to source.

In the construction of contracts the cardinal rule is, as
125 has been stated, to effectuate, if possible, the intention of the parties.

The different clauses of a written contract should be construed together and the intention gathered from the whole instrument, unless it is obvious the parties intended otherwise.

"Courts construing contracts look to the language, the subject-matter, and the circumstances and avail themselves of the light the parties had when the contract was made, in order that they may view the circumstances as the parties viewed them and so judge of the meaning of words and their application to things described."

1 Kinney's (U. S.) Dig't, p. 466, sec. 1, and authorities there cited.

The subject-matter of the agreement was the supplying of water to the city of Mobile, and while it is clear the primary object in view was to secure an adequate supply of pure, wholesome water, it seems to me equally clear from the language used in the contract, in view of the circumstances under which it was made, that the intention was

to grant to Stein the sole privilege of supplying the city with water from the Three-Mile creek, and from no other source. Throughout the whole agreement the exclusive right granted Stein is thus described: "The sole privilege of supplying the city of Mobile with water from the Three-Mile creek." No other source seems to have been thought of. Certain it is no other stream or creek or source of supply is mentioned in the agreement, except that of the "Mobile City Water Works," which it appears embraced ground at Spring Hill near the Three-Mile creek, where the fountain was situated.

Another clause in the agreement is that Stein shall have power and authority to conduct the water from any part of the
126 Three-Mile creek. This creek, as the source of supply, was distinctly agreed on and specifically named. If the intention was to grant the sole privilege of supplying water from any and all sources why use the qualifying words "from the Three-Mill creek?"

There were several considerations which might have influenced the parties in restricting the grant to the sole privilege of bringing the water from the Three-Mile creek, such as the location and accessibility of that stream, the quantity and quality of the water offered by it, and the fact that the city was the owner of the city water works, embracing ground at Spring Hill, where the fountain was situated and whence the city had been endeavoring for years to get its supply of water.

Owing to the superior advantage of the Three-Mile creek as a source of water supply for the city of Mobile, the parties might reasonably have supposed that no attempt would be made to bring water from any other creek or stream to supply said city, at least for a period of twenty years.

However this may be, by the plain language used in the contract, it seems to me its meaning is free from ambiguity or doubt. My opinion, therefore, is that Stein's grant under the agreement of December 26th, 1840, is of the sole privilege of supplying the city with water from the Three-Mile creek and from no other source.

But it is contended by the complainant that the act of January 7th, 1841, does not simply confirm the before-mentioned agreement, but that it grants and vests in Stein all the rights, powers, privileges, and immunities which were granted to the Mobile Aqueduct Company under the acts of the General Assembly of the State of Ala., passed December 20th, 1820, and December 25th, 1837. And he contends that under these acts Stein had the exclusive right
127 and privilege of conducting and bringing water for the supply of said city, without restriction as to source, and it is claimed that if the intention was to restrict the franchise granted Stein to the use of water from the Three-Mile creek merely there was no necessity to vest in him the rights, privileges, and immunities granted under the acts of 1820 and 1837.

The act of 1841 vested in Stein such rights, powers, privileges, and immunities as were granted by the acts of 1820 and 1837, so far as they were not inconsistent with the terms of the agreement of 1840; so far as they were inconsistent therewith he took nothing under them. If the acts of 1820 and 1837 granted the exclusive right and

privilege of conducting and bringing water for the supply of said city from any and all sources for forty years, as is contended by complainant, then the rights and privileges granted by said acts were inconsistent with the terms of the agreement, and were not, therefore, granted and vested in Stein by the act of 1841. As is said by one of the learned counsel in this case in an able brief submitted by him: "Whatever rights are taken under the acts of 1820 and 1837 must be consistent with the grant under the agreement of 1840. If they are inconsistent they cannot stand together. A sole privilege for forty years from all sources is a different thing from a sole privilege for twenty years from a definitely expressed source of supply." And we have seen that Stein, under the agreement, had the exclusive or sole privilege to supply water from the Three-Mile creek only for a period of twenty years. It may be said that the necessity for vesting in Stein the rights, privileges, and immunities granted under the acts of 1820 and 1837 was to protect the property invested in the water works under the provisions and penalties created under these acts, and the right to lay its pipes and to
128 keep them in repair in or under the public roads of the county and streets of the city of Mobile, and to provide protection against injury and damage to the property. The rights, privileges, and immunities as provided for by the acts of 1820 and 1837 were very necessary for the proper enjoyment of the privileges granted to Stein under the contract. But do the acts of 1820 and 1837 grant an exclusive right to supply the city of Mobile with water from any and all sources? The act of 1837 authorized the formation of a corporation and clothed it with the privileges conferred by the act of 1820, until the first day of December, 1856, and until they shall have been purchased out by the city of Mobile. It appears to have been purchased out in some manner prior to December, 1840, and it does not appear that the corporation ever did exercise the rights and privileges conferred on it. The act of 1820, in its preamble recites, among other things, "that certain individuals have agreed to associate themselves together for the purpose of conducting a supply of water from a creek called Three-Mile creek for the use of the citizens and other persons residing in the city of Mobile." The first section of the act authorizes the formation of a corporation, the second section the digging of canals, ditches, &c., and the third section provides that said corporation "shall have and enjoy the exclusive right and privilege of conducting and bringing water for the supply of said city for the space of forty years: Provided, The said corporation shall, before the expiration of three years from the passage of the act, cause to be conducted the water from the said creek to the said city of Mobile in the manner hereinbefore proposed."

129 The preamble of a statute is a key to it to open the minds of the makers as to the objects which are to be accomplished by the provisions of the statute. It is an explanation of what is to follow. Hence we construe the act in connection with the preamble; and, doing so, I can reach no other conclusion than that the intention of the Legislature was to restrict the exclusive privilege of supplying the water to the Three-Mile creek. The condition or pro-

viso in the 3rd section clearly applies to the manner and time in which the water from the said creek should be conducted to the city. The State, in effect, says in the act: "Whereas certain persons have agreed to associate themselves together for the purpose of conducting a supply of water from the Three-Mile creek for the use of the citizens of Mobile, therefore they are authorized to form a corporation for that purpose, and they shall have the exclusive right to conduct and bring water for the supply of said citizens for the space of forty years, provided they bring the water from the said creek within three years from the date of the act and in the *names* therein proposed."

"Nothing is better settled than that statutes creating monopolies, granting franchises and charters of incorporation, must be construed liberally in favor of the public and strictly against the grantee. Monopolies are justly regarded as encroachments upon the natural rights of the people, and are viewed with jealousy by courts."

Sedg. Stat. Law, 330.

Saginaw Gas Light Co. *vs.* City of Saginaw, 28th Fed. Rep., 539.

And the principle is "that all rights which are asserted against the State must be clearly defined. If on a fair reading of the instrument reasonable doubts arise as to the proper interpretation to be given to it, these doubts are to be solved in favor of the
130 State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State.

Chenango Bridge Co. *vs.* Binghamton Bridge Co., 3 Wallace Rep., 51.

It is further contended by complainant that there was granted by the State to Stein the "exclusive privilege" to use the streets of Mobile for the purpose of laying pipes or conduits through which to bring water for the supply of the city, and that the privileges granted by the State to the defendant to lay pipes in the streets for the purpose of conveying water to said city is plainly in derogation of the State's grant to Stein, and the case of the New Orleans Water Works Co. *vs.* Rivers, in 115 U. S. Reps., p. 632, is cited as one very much like this case, and the court is asked to compare the charter of that company with the acts granting Stein's franchise. On such compaison and on an examination of that case I find a wide distinction between it and this case. The language of the New Orleans Water Works charter is: "The exclusive privilege of supplying the city and inhabitants of New Orleans with water from the Mississippi river or any other stream or river by means of pipes or conduits on or over any of the lands or streets of New Orleans."

Subsequently, under a legislative grant, Rivers proceeded to supply his premises (the St. Charles Hotel) with water from the Mississippi river by means of pipes and conduits laid through the public streets of New Orleans, and the court held in the case cited that the

grants to Rivers was plainly in derogation of the grants to the New Orleans Water Works Company. There Rivers was proposing to bring the water from the Mississippi river and by means of pipes on or through the streets of New Orleans, when the New Orleans Water Works Company had the exclusive privilege to bring
131 water from the same source and by the same means. Here there is no complaint that the defendant proposes to bring water from the Three-Mile creek, and here Stein has no exclusive privilege granted him to use the streets for his pipes. He had the exclusive right to bring water from the Three-Mile creek, and had the privilege granted him of using the streets free of charge for the purpose of laying down pipes for the conveyance of water. The language is "shall be permitted the use of the streets in the city of Mobile free of charge for the purpose of laying pipes for the conveyance of water, * * * and that the canal or ditch shall be conducted along any of the streets thereof."

And it is further claimed that if Stein's privilege only extends to supplying the city with water from the Three-Mile creek, and only through the works erected by him, still the right and privilege was secure to him without "let, molestation, or hindrance," and that the grant to the defendant is a molestation or hindrance to him in the full enjoyment of the privileges secured by his contract.

The city contracted with Stein that he and his executors and assigns should have and retain quiet possession of the water works for the term of twenty years without let, molestation, or hindrance of the city or its successors, or any person or persons claiming by or under them, and should have quiet possession of the same until the city or its successors shall redeem the said works.

It does not appear from the record that the State or the city of Mobile or its successors or any person claiming under them are now interfering with or proposed to molest or hinder the complainant in the quiet possession of the said water works. He still has the right to retain such possession and to supply water from said works to the citizens of Mobile, and this right will continue until
132 the city of Mobile or its successors shall redeem the said works. I am of opinion that Stein's exclusive right to supply the city of Mobile with water from the Three-Mile creek has long since expired (expired in December, 1860), but the exclusive use of his water works and the exclusive right to supply water therefrom to the citizens of Mobile remains to him.

If I am correct in the conclusions already reached in this case and herein announced, the point raised by the counsel for defendant, that the contracts under consideration are those in which the public health are involved and may be modified or abrogated at the will of the Legislature, is of no consequence and need not now be decided. I will say, however, that I am now of the opinion that no question as to the exercise of the police power of the State arises in this controversy. The grant of the charter to the Bienville Water Supply Company is not, as I view it, in any sense an exercise of the police power of the State. (See N. O. Gas Co. *vs.* La. Light Co., 115 U. S. Reps., 650, and authorities there cited.)

My conclusion is there is no equity in complainant's bill of complaint, and that all the demurrers thereto should be sustained., except the 6th, 7th, 8th, 9th and 10th, which are overruled.

Filed March 7th, 1888.
(S'g'd) N. W. TRIMBLE, *Clerk.*

133 *Decree Sustaining Demurrers.*

Circuit Court of the United States for the Southern District of Alabama. In Equity.

LOUIS STEIN, Ex'r of Albert Stein, Dec'd,
vs.
THE BIENVILLE WATER SUPPLY COMPANY. } 150.

This cause came on to be heard on the several demurrers filed by the defendant to the complainant's bill of complaint, and they were argued by the counsel for the parties, and the same being now heard and understood by the court, it is ordered and adjudged by the court that the causes of demurrer of record numbered 6, 7, 8, 9, and 10 are not well taken and the same are overruled, but the causes of demurrer numbered one, two, three, four, five, eleven, twelve, thirteen, fourteen, and fifteen are well taken and the
134 same are sustained, and there is no equity in the complainant's bill of complaint.

It is therefore ordered, adjudged, and decreed that said complainant's bill of complaint be, and the same is, dismissed out of this court. It is further ordered, adjudged, and decreed that complainant pay the costs of the cause, for which execution may issue.

And now comes the complainant and prays an appeal to the Supreme Court of the United States at its next term, and the same is allowed on complainant's entering into bond in the sum of five hundred dollars, with satisfactory sureties, conditioned as required by law, to be approved by this court or a judge thereof.
(S'g'd) HARRY T. TOULMIN, *Judge.*

Filed March 7th, 1888.
(S'g'd) N. W. TRIMBLE, *Clerk.*

135 *Appeal Bond.*

Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama. In Equity.

LOUIS STEIN, Ex'r, &c.,
vs.
THE BIENVILLE WATER SUPPLY COMPANY. } 150.

Know all men by these presents that we, Louis Stein, executor, &c., as principal, and Edmond Carré and Mandford W. Du Bose, as sureties, are held and firmly bound unto the Bienville Water Supply Company in the penal sum of five hundred dollars, lawful money of the United States, to be paid to the said Bienville Water Supply

Company or their successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly
136 and severally, our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this the 8th day of March, A. D. 1888.

Whereas the above-named Louis Stein, ex'r, &c., has prosecuted an appeal to the Supreme Court of the United States from a decree in equity rendered against him on the 7th day of March, A. D. 1888, in the circuit court of the United States for the fifth judicial circuit and southern district of Alabama, in a certain cause lately in said circuit court pending, wherein said Louis Stein, as executor, &c., was complainant and the Bienville Water Supply Company was respondent, to reverse the decree in the above-entitled cause by said circuit court:

Now, therefore, the condition of this obligation is such that if the above-named Louis Stein, ex'r, &c., shall prosecute his appeal to effect and answer all the requirements of said decree and all
137 costs if he shall fail to make good his said appeal, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(S'g'd) LOUIS STEIN, *Executor.* [SEAL.]
EDMOND CARRÉ. [SEAL.]
MANFORD W. DU BOSE. [SEAL.]

Approved this 8th day of March, A. D. 1888.

(S'g'd) HARRY T. TOULMIN, *Judge.*

UNITED STATES OF AMERICA, *Southern District of Alabama,* } ss:

Before me, E. T. Broadway, deputy clerk of the circuit court of the United States for the southern district of Alabama, personally came Edmond Carré and Manford W. Du Bose, who, being each duly sworn according to law, did depose and say that they
138 and each of them is worth the amount of the foregoing bond over and above all debts and liabilities and exemptions to which they and each of them is entitled under the constitution and laws of the State of Alabama.

(S'g'd) EDMOND CARRÉ.
MANFORD W. DU BOSE.

Subscribed and sworn to before me this 8th day of March, A. D. 1888.

(S'g'd) E. T. BROADWAY,
Dep'y Clerk U. S. Cir. Court, Sou. Dist. of Ala.

Filed March 8th, 1888.

(S'g'd) N. W. TRIMBLE, *Clerk.*

139 I, N. W. Trimble, clerk of the circuit court of the United States for the southern district of Alabama, hereby certify the foregoing pages, numbered from 1 to 138, inclusive, to be a full, true, and correct transcript of the following papers filed and entries made in the case in equity of Louis Stein, as executor, &c., *vs.* The Bienville Water Supply Company, to wit: The bill and Exhibits A, B, C, D, E, F, and G thereto; the subpœna in equity and return thereof; appearance for def'd't; entry as to appearance; the demurrers to the bill; entry as to filing of demurrers; the entry setting demurrers down for argument; the opinion of the court; the decree sustaining the demurrers, &c., and the appeal bond, as the same now remains of record and on file in my office.

In witness whereof I hereunto subscribe my name and cause
140 the seal of the said circuit court to be affixed this the 19th day of March, A. D. 1888.

[Seal United States Circuit Court, Southern Dist. of Ala.]

N. W. TRIMBLE, *Clerk.*

Endorsed on cover: S. Alabama C. C. U. S. No. 1396. Louis Stein, executor of the estate of Albert Stein, deceased, appellant, *vs.* The Bienville Water Supply Company. Filed March 27, 1888.

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Supreme Court of the United States.

LOUIS STEIN, EXECUTOR OF ALBERT STEIN,

vs.

THE BIENVILLE WATER SUPPLY COMPANY.

No. 344.

APPELLANT'S BRIEF.

W. HALLETT PHILLIPS,

for Appellant.

R. O. Polkinhorn, Printer.

Supreme Court of the United States.

LOUIS STEIN, EXECUTOR OF ALBERT STEIN,
vs.
THE BIENVILLE WATER SUPPLY COMPANY.
No. 344.

Brief of W. Hallett Phillips for Appellant.

The case is one arising under the Constitution of the United States. The appellant here was, complainant below.

He claimed that a contract conferring on his testator the exclusive franchise and privilege of supplying the city of Mobile with water, had been impaired by a subsequent grant by the State of Alabama of a similar right to the defendant, the Bienville Company.

Stein filed his bill against such Company in the Circuit Court, to enjoin it from laying its pipes in the streets of Mobile for the purpose of furnishing water, from conducting water into the city, and from otherwise interfering with plaintiff's exclusive franchise.

The defendant demurred to the bill.

Some of the grounds of the demurrer were sustained, and the bill was dismissed. (R., 43.)

ASSIGNMENT OF ERROR.

The court erred in sustaining causes of demurrer 1, 2, 3, 4, 5, 11, 12, 13, 14, 15; in holding there was no equity in complainant's bill, and in dismissing the same. The decree should have been as prayed by the complainant.

ARGUMENT.

There are two main questions ;

1. The extent of the privilege of complainant.
2. The period of its duration.

The court held that the exclusive privilege claimed, was confined to supplying water from a stream called Three-mile Creek, and that such privilege expired in 1860.

STEIN'S CONTRACT.

The determination of the questions involved, depend on the construction of the contract made with Stein, as confirmed by the State legislature, and as contained in the preceding acts, the benefits of which were vested in Stein.

If, as contended by appellant, they conferred the exclusive right of supplying the city with water, it necessarily follows that the legislature had no power by subsequent legislation to confer a like privilege on the defendant.

This much is admitted by the court below.

After various abortive attempts to obtain a water supply for the city of Mobile continued for twenty years, the city, in 1840, entered into a contract with Albert Stein. This was confirmed by the act of 1841. (Acts of Alabama, 1841, p. 5.)

By the first section of the agreement, the city grants to Albert Stein:

> "The sole privilege of supplying the city of Mobile with water from the Three-Mile Creek, for twenty years from the date of this agreement, as well as all the advantages and benefits which accrue to the said Mayor, Aldermen and Common Council, from, by or under an Act of the Legislature of the State of Alabama, entitled an Act to incorporate an Aqueduct Company in the City of Mobile, passed December 20th, 1820, and all ordinances and resolutions passed by the said Mayor and Aldermen of the City of Mobile, under and by virtue of said Act, or by the Act of incorporation of the said City of Mobile, and the several Acts amendatory thereto, which in any way or manner relate to the said 'City water works,'' or the right to supply the said City with water, as well as all the benefits and advantages which accrue to the said Mayor, Aldermen and Common Council, or the Mayor and Aldermen of the City of Mobile, from, by or under an Act of the Legislature of the State of Alabama entitled an Act to incorporate the Mobile Aqueduct Company, passed December 25th, 1837.''

Before leaving the granting clause, it may be well to consider what it is that is granted.

Appellant maintains it is the privilege or franchise of supplying the city with water. That privilege is to be exclusive, and the water is to be drawn from Three Mile Creek.

In addition, Stein is to have all the privileges and advantages which accrue from the previous legislation and contracts regarding the water supply of the city. A reference to these acts shows if there is any doubt, the extent of the privilege conferred on Stein.

By the act of 1820, incorporating the Aqueduct Company, it is provided by Section 3, "that the said corporation and their successors shall have and enjoy the exclusive right and privilege of conducting and bringing water for the supply of said city for the space of forty years." (Acts of Alabama 1820, p. 72.)

This clause became a part of Stein's contract. The agreement, too, confers on Stein the advantages of the preceding legislation which, in any manner, relate to the city water works, "OR THE RIGHT TO SUPPLY THE SAID CITY WITH WATER."

It would seem to be plain that the city understood that it was dealing with the whole water supply of the city, and as an inducement for Stein to embark his money in an enterprise which had, up to that time, failed, he was promised an indemnity coextensive with the expenditure and risk incurred.

That indemnity was the exclusive right to supply the city, a right which had been offered to previous contractors without obtaining the desired result, and which was again promised to him.

In the opinion of the court below, the parties had not in view the whole water supply of the city, but only the question of a supply from a particular head or source.

It is said that Stein's contract specially mentions the source from which the water was to be derived, and that his exclusive privilege to supply water, must be confined to water drawn from that particular source, leaving all other sources of supply open to grant by the State to a competitor.

The Court accordingly sustained the charter of the defendant company, granted in 1883, empowering it to exercise the exclusive privilege of supplying the city with water from any source except the Three Mile Creek. Acts of Ala 1882-3. p 451.

That company adopted, as a source of supply, a stream called Eight Mile Creek, and was proceeding to introduce water into the city from it, when the bill was filed.

The Court overlooked the fact that what the city and State were granting what they controlled—the privilege of supplying the city with water, necessitating the use of the roads and streets and, perhaps, the condemnation of property.

Neither the city nor State had any control over, or interest in the Three Mile Creek.

It entirely appertained to the riparian proprietors, and whatever rights Stein acquired thereto, was from those proprietors.

Nor can it be supposed that the exclusive right was to be confined to the use of the water works which were to be constructed by and belong to Stein.

The exclusive right appertained to what belonged to the city. That was "THE RIGHT TO SUPPLY THE CITY WITH WATER."

The construction of the water works and the supply of the city with water from the Three Mile Creek was not the exclusive privilege, but the duty of Stein, a duty which constituted the consideration for the privilege which was granted.

The right to charge all persons using the water supplied by Stein was the privilege or franchise which he had, and that right was rendered valuable by being made exclusive.

Bridge Proprietors vs. *Hoboken*, 1 Wall, 149.

The Court discards the reference in the Stein contract to the act of 1820, for two reasons:

First, because the Legislature, in confirming Stein's contract by the act of 1841, confirmed to him the rights or privileges of the act of 1820, "not inconsistent with the terms of the agreement." It is argued, that if Stein's agreement, only gave him the exclusive right to supply the city from the Three Mile Creek, such right is inconsistent with the exclusive and unrestricted right conferred by the act of 1820.

The answer to this is that the exclusive right vested

by the act of 1820, is not inconsistent with the privilege conferred by the Stein agreement, and the act of 1841.

It is only a question of the extent of the privilege, and the act of 1820 indicates what the parties had in mind in making the agreement.

The advantage and benefit to Stein, was the exclusive privilege of supplying the city with water, and there was nothing inconsistent with this in specifying a source of supply.

To this extent the two acts entirely harmonize.

If, therefore, the act of 1820 conferred the exclusive right as we contend, it passed to Stein by virtue of the agreement of 1840 and the confirmatory act of 1841.

The second ground on which the court below rejected the act of 1820 as inconclusive was, that it, like the Stein contract, only gave the exclusive privilege so far as concerns the water derived from Three-Mile Creek.

As this is a point of much importance it is necessary to consider more particularly the act of 1820.

It affords the first mention of Three-Mile Creek and explains why it should have been contained in Stein's contract.

The act is one "to incorporate an Aqueduct Com-

pany in the city of Mobile." The preamble recites "that it had been represented that it would be to the advantage of the city to be supplied with water *from some of the running streams* in its vicinity, which would be attended with too much labor and expense, to be effected by laying a tax for the purpose; and it had also been represented that certain individuals had agreed to associate themselves together for the purpose of conducting a supply of water from a creek called the Three-Mile Creek for the use of the citizens."

Section 1 incorporates the company and authorizes them to make the necessary by-laws and regulations "for the attainment of the object of its creation."

Section 2 authorizes the company, "by the best means within their power and by the nearest practicable route, to dig or cause to be dug a channel or canal sufficiently deep and wide to contain logs of an adequate size, with a calibre large enough to contain and conduct sufficiency of water to supply the citizens and other persons of Mobile with water." * *

Section 3 enacts, as we have already shown, that the said corporation and their successors shall have and enjoy the exclusive right and privilege of conducting and bringing water for the supply of said city for the space of forty years, "provided the said corporation or their sucessors shall, before the expiration of three years from the passage of this act, cause to be conducted the water from the said bayou and creek to the said city of Mobile in the manner

hereinbefore proposed. (Acts of Alabama, 1820, p. 72.)

It is from the mention of Three-Mile Creek in the preamble, and in the proviso in the third section, that the court concludes that it was not the intention to confer the exclusive privilege of bringing water for the supply of the city, notwithstanding the plain and unmistakable language used in the granting clause.

So far as concerns the reference in the preamble to the Three-Mile Creek, it tells in favor of complainant.

It evidences that all the city was striving for was to be supplied with water from *some* of the running streams in the vicinity.

It was not bargaining for the franchise of supplying water particularly or alone from Three-Mile Creek, and the reference to that stream in the preamble was, as recited, because the incorporators had selected that as a source of supply.

When the city specifies the franchise granted, its language is unrestricted, and embraces the whole and exclusive privilege of supplying the city with water.

That grant is made on condition, that the city is supplied with water from the Three-Mile Creek, before the expiration of three years, in the manner hereinbefore proposed by the company.

This proviso was a *condition* required by the city for its benefit. It in no wise undertook to qualify

or limit the extent of the privilege conferred on the company in the granting clause.

The limitation of the time of the grant has no bearing on the controversy, as the act of 1820 was revived by the State in 1841, in favor of Stein, so far as its advantages and privileges are concerned.

Undoubtedly, from the first, both parties acted on the assumption that a sufficient supply of good and wholesome water could be obtained from the Three Mile Creek.

It was that which led the original contractor to undertake to convey water from that source, and a similar inducement led the city to stipulate that the water should be brought from the same source, as a condition to the grant of the exclusive franchise to supply the city with water.

But that fact affords no indication that the franchise was limited to the supply of water from the particular stream.

The language is guarded against any such construction.

The franchise granted by the act of 1820, remained in full force in the succeeding acts.

The act of 1824 "to alter and amend the charter of incorporation of the City of Mobile," by section 18, enacts that the act of 1820 be, and the same is hereby, declared to be null and void, the said corporation

having failed to comply with the requisitions of said act, and all the rights, privileges and immunities which appertained to the said company, by virtue of the aforesaid act, are hereby transferred to and vested in the corporation of the City of Mobile, for the use and benefit of the inhabitants thereof. (Acts of Ala., 1824-5, p. 68.)

In 1836, the city transferred to Hitchcock the water privilege to the same extent as held by it under the act of 1824, as well as its interest in such waterworks as had been constructed and the pipe which had been laid down.

It was provided that he should have the power and authority to make such alterations and repairs upon the said works, and to erect such new works, and in such manner as he may deem necessary and proper, and might at will change the fountain head, and conduct the water from any part of Three Mile Creek, so that the same be good and wholesome. (R. 11.)

The act of 1837 incorporates the "Mobile Aqueduct Company." Section 4 provides, the said company shall have and enjoy all the rights, privileges, and immunities which are contained in the act of 1820, which act, except as modified by this act, is hereby received and declared to be in force.

Section 5 recognizes and confirms the contract made in 1836 with Hitchcock, and it is provided, upon his assigning the same to the company hereby incorporated, which he is authorized to do, the

same in all its parts, shall accrue to the benefit of said company. (Acts of Ala., 1837, p. 76.)

Hitchcock made the assignment in accordance with the act, but the Aqueduct Company, like its predecessor, failed to perform its contract to construct the water works and supply the city with water.

This was the condition of things when, in 1840, the city entered into the agreement with Stein which was confirmed by the act of 1841.

Stein constructed water works according to his contract, and supplied the city with water at an expense of over $200,000.

His exclusive privilege was never contested until the defendant company procured its charter in 1883, and proceeded to lay its pipes in the city for the purpose of supplying the same with water.

Duration of the Franchise.

The court below were of the opinion that whatever exclusive right was originally possessed by the complainant, terminated in 1860.

The complainant maintains that such a construction is inconsistent with the express terms of his contract.

The grant of the privilege was for twenty years.

The city covenants and agrees, that it will, at the expiration of the said term of twenty years (the said Stein, delivering up the water works, and appurtenances, in good order and condition), pay to him their actual value as determined by six arbitrators.

The city further covenants and agrees with Stein that he shall have quiet possession of the said works, during their erection and after they shall be completed, for the term of twenty years, and for any further time until the said parties of the first part, or their successors in office, shall redeem the said works from the said party, of the second part, (Stein), his heirs, executors, administrators or assigns, according to the aforesaid stipulation.

Further, that Stein shall retain quiet possession of the water works, for the said term of twenty years, without let, molestation, or hindrance of the said Mayor, Aldermen or Common Council, or their successors in office, or any person, their successors in office, or any person or persons claiming by, through or under them.

> "And that the said Albert Stein, his executors, administrators and assigns, shall, during *the said term of twenty years, or any further time, until said works are redeemed as above stipulated, have the exclusive privilege of supplying to the citizens and inhabitants of the City of Mobile water from the water works aforesaid.*"

In the face of the express stipulation of the con-

tract, it is difficult to see how Stein's privilege was in any way affected by the expiration of the twenty years, or until his works should be purchased by the city.

The language in this particular, is in no essential different from that used in Section 4, of the act of 1837. By the act of 1837 the privilege is to "continue until the first day of December, 1856, *and until they shall be purchased out by the corporation of the City of Mobile, as is hereinafter provided; during which period the said company shall have and enjoy all the rights, privileges, and immunities which are contained in the act entitled 'An Act to incorporate an Aqueduct Company in the City of Mobile,' passed the 20th day of December*, 1820."

The act of 1820, as we have shown, conferred the exclusive power to supply the city with water.

It is this right which is continued by the act of 1837 and the contract of Stein, until he shall have been purchased out by the city.

No such purchase has yet been made.

THE RULE OF CONSTRUCTION.

In order to defeat complainant's grant, the familiar rule as to the construction of contracts by a State for exclusive privileges, is invoked.

It is said that if the privilege is at all in doubt, such doubt is fatal to the claim.

The general rule of interpretation, is undeniable.

But this like all other technical rules yields to the principle that every contract, whether made by a State or an individual, should be fairly and honestly construed according to good faith, so as to give full effect to the obvious intention.

As Chief Justice Marshall observed in *Huidekoper* vs. *Douglass*:

> "This is a contract, and although a State is a party it ought to be construed according to those well established principles which regulate contracts generally." (3 Cr., 70.)

Those general principles are stated by this Court in the Binghampton Bridge case, which involved an exclusive privilege.

The court there remark, that contracts are to be construed to accomplish the intentions of the parties; and in determining their different provisions a liberal and fair construction will be given to the words, either singly or in connection with the subject matter. It is not the duty of the court by legal subtlety to overthrow a contract, but rather to uphold it and give it effect, and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambiguity, and the meaning of the parties can be clearly ascertained, effect is to be given to the instrument used, whether it is a legislative grant or not.

The court, after considering the circumstances under which the contract was entered into by the State and the object sought to be attained, says that these

considerations are great helps in arriving at a correct knowledge of the intention of the legislature, and in giving a proper construction to the grants that were made. For it should never be lost sight of that the main canon of interpretation of a contract is to ascertain what the parties meant and understood. (3 Wall., 75.)

In that case, the legislature had granted to the Delaware Bridge Company, a privilege to build a bridge with a provision that the company should be free from competition. By a subsequent act creating the Susquehanna Bridge Company, it declared that all the provisions, sections, and clauses in the Delaware charter, not inconsistent with the particular provisions of the Susquehanna charter, should be extended to the latter corporation. It was contended that the exclusive feature of the charter of the Delaware company did not pass to the Susquehanna company. But the court declared:

"When it is conceded, as it must be that a franchise which prohibits competition is an advantage, and that it was enjoyed by the Delaware company, and that there is nothing in the peculiar provisions of the Susquehanna charter which prevents that company from enjoying it, then it is conferred, and there is an end to the controversy." (*Ib.*, 79.)

Lord Coleridge, in delivering the judgment of the privy council, observes: "Upon a question of the meaning of words the same rules of common sense and justice must apply, whether the subject-matter of construction be a grant from the Crown, or from a subject. It is always a question of intention to

be collected from the language used with reference to the surrounding circumstances." (*Lord* vs. *Sydney*, 12 Moore, P. C., 497.

The work undertaken by Stein was of a public nature, properly appertaining to the public authority.

The reason why it was not undertaken by the city was, as stated in the act of 1820, that the requisite amount was too large to be raised by taxation.

Accordingly, the contract was finally entered into with Stein.

A contract of such a nature could have no other than such construction as to enable the contractor to perform the undertaking.

No construction should be strained to prevent him from reaping the full benefit of the contract when completed.

The nature of such a contract is well stated by this Court in the Binghampton Bridge case, already quoted.

> "The wants of the public are often so imperative that a duty is imposed on the government to provide for them; and, as experience has proved that a State should not directly do this, it is necessary to confer on others the faculty of doing what the public power is unwilling to undertake. The legislature, therefore, says to public-spirited citizens, 'If you will embark, with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity,

> privileges that will justify the expenditure of your money, and the employment of your time and skill. Such a grant is a contract, with mutual considerations, and justice and policy alike require that the protection of the law should be assured to it."

These remarks are cited with approbation, in *New Orleans Gas Light Co.* vs. *Louisiana Light Co.*

That was a case of a grant of an exclusive privilege to light the city of New Orleans. Say the court:

> "Legislation of that character is not liable to the objection that it is a mere monopoly preventing citizens from engaging in an ordinary pursuit of business, open as of common right to all, upon terms of equality; for the right to dig up the streets and other public ways of New Orleans and place therein pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the State, or by the municipal goverment of that city acting under legislative authority." *New Orleans Gas Co.* vs. *Louisiana Light Co.*, 115 U. S. 659.

This case also holds that such a contract as the one in this case, as protected by the Federal Constitution.

There is no question here as to the exercise of the police power of the State.

The court below say "the grant of the charter to the Bienville Water Supply Company, is not, as I view it, in any sense an exercise of the police power of the State." (R., 42.)

This Court declared in the New Orleans Water Works Case, that notwithstanding the exclusive privileges granted to the plaintiff, the power remains with the State, or with the municipal Governmet of New Orleans, acting under legislative authority, to make such regulations as will secure to the public the uninterupted control of the streets, as well as prevent the distribution of water unfit for use, and to provide for such a continuous supply in quantity, as protection to property, public and private, may require.

N. O. Water Works vs. *Rivers*, 115, U. S., 681.
Tammany Water Works vs. *N. O. Water Works*, 120 U. S., 65.

The question for decision is not whether the State could compel the complainant in case the present supply of water from his works is not sufficient, to make such changes as would bring about an adequate supply, but whether it can disregard the contract of complainant, and grant to others what had been previously granted to him.

We submit that the relief prayed for should have been decreed.

W. HALLETT PHILLIPS,
for Appellant.

APPENDIX.

AN ACT

TO INCORPORATE AN AQUEDUCT COMPANY IN THE CITY OF MOBILE.

WHEREAS, It has been represented, that it would be of singular advantage to the health and commerce of the City of Mobile, to *be supplied with water from some of the running streams in its vicinity*, which would be attended with too much labor and expense to be effected by laying a tax for the purpose; and whereas, it has been represented, that certain individuals have agreed to associate themselves together for the purpose of conducting a supply of water from a creek called Three Mile Creek, otherwise Bayou Chatogue, for the use of the citizens and other persons residing in the City of Mobile: Therefore,

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened*, That Lewis Judson, Addin Lewis, Archibald W. Gordon, William H. Robertson and Francis W. Armstrong, their heirs, executors, administrators and assigns, be, and they are hereby created and constituted a corporation and body politic, by the name and style of "The Mobile Aqueduct Company," and, by that name, they shall be, and are hereby, made able and capable in law to have, purchase, receive, possess, enjoy and retain to them, and their successors, lands, rents, tenements, hereditaments, goods, chattels and effects of whatever kind, nature and quality, and the same to sell, grant, demise, alien and dispose of; to sue, and be sued, plead and be impleaded, answer and to be answered, defend and to be defended, in any suit, action, matter or thing depending, in any court of law or equity, and also to make, and have, and use a common seal, and the same to break, alter and renew at their pleasure, and also to ordain, establish and put into execution such by-laws, ordinances and regulations as they shall deem necessary and convenient for the government of said corporation, and for the attainment of the object of its creation, not being contrary to this charter, or the laws of this State or of the United

States, and generally to do and to execute all and singular the acts, matters and things which to them may appear necessary, or which to them it may appertain to do, as incident to bodies corporate under the restrictions before mentioned.

SEC. 2. *And be it further enacted*, That the members of the said corporation be, and they are hereby authorized and empowered, as soon as practicable, and by the best means within their power, and by the nearest practicable route, to dig, or cause to be dug, a channel, or canal sufficiently deep and wide to contain logs of an adequate size, with a calibre large enough to contain and conduct sufficiency of water to supply the citizens and other persons of Mobile with water, and from time to time, and at all times hereafter, during the continuance of this charter, to enter upon the route and course of the said canal or ditch, as they may deem it necessary for the purpose of laying, repairing or amending the said logs, canal or ditch, hereby declaring it lawful for the members of the said corporation, or any, or either of them, their successors or assigns, or others employed by them for that purpose, from time to time, as often as in their opinion it may be necessary to enter upon the lands of any person through which the said canal or ditch may pass for the purpose of opening the said canal or ditch, and placing the logs therein, and from time to time, and at all times thereafter, during the continuance of this franchise, to re-enter as often as they may deem it necessary so to do, for the purpose of repairing the aforesaid canal or ditch, or replacing any logs that may be decayed, or otherwise injured, they being liable and accountable to the legal owner or owners of the land through which the said canal or ditch may pass for any special damages that may be sustained by reason of the aforesaid canal or ditch being dug and continued as aforesaid, which said damage shall be ascertained by appraisers, two of whom shall be chosen by said corporation, and two others by the owner or owners of the said land; and in case of difference, the said four appraisers shall choose a fifth appraiser or arbitrator, and the appraisement by them made shall be conclusive on both parties as to the damage done: *Provided*, nevertheless, that the said canal or ditch shall not be dug through any lot or lots in the city, but shall be conducted along any of the streets thereof as may be most practicable.

SEC. 3. *And be it further enacted, by the authority aforesaid*, That the said corporation and their successors shall have and enjoy the exclusive right and privilege of conducting and bringing water for the supply of said city for the space of forty years: *Provided*, the said corporation or their successors shall, before the expiration of three years from the passage of this act, cause

to be conducted the water from the said Bayou or Creek to the said City of Mobile, in the manner hereinbefore proposed: *And provided also*, that after the expiration of the said term of years, the said Water Works shall become the property of the said city, and shall be for the free use of the inhabitants thereof forever: *Provided also*, the said corporation shall not carry the canal or ditch through the land of any person or persons without first obtaining from the owner, by purchase or otherwise, the privilege of doing so.

SEC. 4. *And be it further enacted*, That if any person or persons whatsoever shall wantonly deface, remove, or otherwise injure or disturb the logs placed in the aforesaid canal or ditch, pipe or pipes of lead, or other thing that may lead from the logs aforesaid, or shall remove from above the said logs any earth covering them, or shall obstruct or injure, by logs, bushes, earth or other materials, the water of the said creek at any place between the source thereof and the place whence the water is taken or conducted for the use of the said city as aforesaid, he, she, or they so offending, for every such offence, shall forfeit and pay the sum of twenty dollars, to be recovered by action of debt before any justice of the peace, one-half thereof shall go to the use of the City of Mobile and the other to the informer; and moreover, such person shall be liable to pay also any particular damage that may be sustained thereby, by the said corporation, and the informer is hereby declared a competent witness to prove any damage done as aforesaid.

SEC. 5. *And be it further enacted*, That it shall and may be lawful for the said corporation and their successors to take, demand and receive from every private family any sum, not exceeding one dollar per annum for each and every person, including servants and children, of which said family may consist, in consideration of being supplied with water, as in this act provided; and for each and every public house or tavern the sum of twenty dollars in addition to the sum demanded of a private family; and for each and every private boarding-house the sum of fifteen dollars in addition to the rate or sum aforesaid, to be paid half yearly in advance: *Provided*, that no person shall be obliged to pay for any time that the water may be stopped, whether by accident or otherwise, and a proportionable deduction shall be made for all such time as aforesaid: *And provided also*, that no person shall be compelled to pay the sum or sums aforesaid who does not use directly or indirectly the water conveyed to said city as aforesaid.

SEC. 6. *And be it further enacted*, That it shall and may be lawful for the corporation aforesaid, and their successors, to

demand, take and receive for each and every pipe or hogshead of water conveyed to the city aforesaid, which may be taken for the use of ships or vessels, any sum not exceeding seventy-five cents, and the like proportion for casks of smaller size.

SEC. 7. *And be it further enacted*, That any person or persons, inhabitants of said city, who shall use the water conveyed to the city aforesaid, and shall not have declared his, or her, or their intention so to do, nor have paid the sum or sums by this act authorized to be demanded and received, any such person so offending shall forfeit and pay double the sum he, she, or they would have been liable to have paid by the previous provisions of this act, to be recovered by action of debt, before any justice of the peace, to the use of the said corporation and their successors.

SEC. 8. *And be it further enacted*, That the said corporation shall put or cause to be put up at least six hydrants, in six of the most convenient places within the said city, and also shall fix a like number of convenient places for use in case of fire, which places shall be designated by the Mayor and Aldermen of said city, and the said hydrants shall be supplied with convenient and good cocks to facilitate the drawing of the water.

SEC. 9. *And be it further enacted*, That if any person or persons shall wilfully cut, mutilate or otherwise deface or injure the said hydrants, or any part thereof, he, she or they so offending shall pay a fine of twenty dollars, recoverable by action of debt, before any justice of the peace, for the use of the corporation aforesaid, and if any person or persons shall carelessly or negligently leave the water running, or shall not stop the cock, for every such act he, she or they (or if a child) his or her parent or guardian, (or if a slave) his or her master, shall pay for every such act of carelessness or negligence the sum of two dollars, recoverable before a justice of the peace, at the suit of said corporation and to their use.

Approved December 20, 1820,

AN ACT

TO ALTER AND AMEND THE CHARTER OF INCORPORATION OF THE CITY OF MOBILE.

SEC. 7. *And be it further enacted*, That the Mayor and Aldermen aforesaid shall have full power and authority to sink wells and erect repair pumps in the streets.

SEC. 18. *And be it further enacted*, That the act entitled An Act to Incorporate an Aqueduct Company in the City of Mobile, passed December the twentieth, eighteen hundred and twenty, be and the same is hereby declared null and void, the said corporation having failed to comply with the requisitions of said act, and all the rights, privileges and immunities, powers, prerogatives and authority, which appertained to the said Company, by virtue of the aforesaid act, are hereby transferred to and vested in the corporation of the City of Mobile, for the use and benefit of the inhabitants thereof.

Approved December 24th, 1824.

ARTICLES OF AGREEMENT,

Made and entered into the first day of December, in the year one thousand eight hundred and thirty-six, by and between "The Mayor and Aldermen of the City of Mobile," of the first part, and Henry Hitchcock of the second part, witnesseth: That the said "Mayor and Aldermen of the City of Mobile," for and in consideration of the rents, covenants and agreements, hereafter contained, mentioned and reserved on the part and behalf of the said Henry Hitchcock, his executors, administrators and assigns, to be paid, kept, done and performed, have granted, leased, demised and to farm, let, and by the presents, do grant, lease, demise and to farm, let, unto the said Henry Hitchcock, his executors, administrators and assigns, the entire use, control, management, rents, profits, issues and enrollments of the "Mobile City Water Works," so-called, embracing the ground at Spring Hill, where the fountain is situated, and the ground along which the pipes pass from the said fountain to the said City of Mobile, together with the use of all the wooden and iron pipes, and logs already laid down, consisting of about sixteen thousand feet of three-inch calibre, and six thousand feet of six-inch calibre, as well as all the benefits and advantages which accrue to the said "Mayor and Aldermen," from, by or under an act of the Legislature of the State of Alabama, entitled "An Act to incorporate an Aqueduct Company in the City of Mobile," passed December 20th, 1820; and all ordinances and resolutions passed by the said "Mayor and Aldermen," under and by virtue of the said act, or by the act incorporating the said City of Mobile, and the several act amendatory thereto, which in any way or manner relate to the said "City Water Works."

To have and to hold the above-mentioned and described premises, property and privileges, together with all and singular the appurtenances unto the same belonging, or in any wise ap-

pertaining unto the said Henry Hitchcock, his executors, administrators and assigns, from the day of the date hereof, for, during and until the full end and term of twenty years, thence next ensuing, and fully to be complete and ended. Yielding and paying therefore unto the said Mayor and Aldermen of the City of Mobile, and to their successors in office, the rent, or sum of twenty-six thousand dollars, in payments as follows, to wit: the sum of five thousand six hundred and sixteen dollars on the first day of December next; the further sum of six thousand and thirty-two dollars on the first day of December, 1838; the further sum of six thousand four hundred and forty-eight dollars on the first day of December, 1839; the further sum of six thousand eight hundred and sixty-four dollars on the first day of December, 1840; and the further sum of seven thousand two hundred and fifty dollars on the first day of December, 1841; the first payment thereof to begin, and to be made on the first day of December, 1837. For which several sums, or amounts of money, the said Mayor and Aldermen hereby acknowledge that they have received promissory notes for the respective amounts above stated, and reserved with endorsers to secure the payment thereof at the times above stipulated, which notes, when paid, will be in full for the rent aforesaid.

And the said Henry Hitchcock for himself, his heirs, executors, administrators and assigns, doth hereby covenant and agree to, and with the said party of the first part, and their successors in office, that he will during the said term hereby granted well and truly pay or cause to be paid unto the said Mayor and Alderman and their successors in office, the rent above reserved, at the times, and in the manner and form herein above limited and appointed, without deduction, fraud or delay, according to the true intent and meaning of these presents.

And further, that he will during the said term hereby granted, use and occupy the said premises and privileges in a careful and husband-like manner, without in any manner injuring or abusing the same (except to use and enjoy such part of the land and timber, where the fountain is situated, as may be necessary for the alteration or repairing of the said Water Works.)

And further, that he will within the space of two years from the date hereof, put the said Water Works in good and sufficient repair, so as to continue during the time hereby granted. And will also keep up the said Water Works in good order as they now are, until they shall be so placed in good order and repair, so that the said City of Mobile, and the inhabitants

thereof, may at all times be supplied with such quantity of good, wholesome water as may be procured through the said Aqueduct.

And further, the said Henry Hitchcock covenants and agrees, as aforesaid, to surrender up the said Water Works, and all the appurtenances thereto belonging, unto the said Mayor and Aldermen, or their successors in office, in good order and condition, at the expiration of the said term of twenty years from the date hereof, they, the said Mayor and Aldermen or their successors in office, there paying to the said Henry Hitchcock, his executors, administrators or assigns, the amount which the said Water Works have actually cost him, the said Henry Hitchcock, his executors, administrators or assigns during the said term of twenty years.

And further, the said Henry Hitchcock covenants and agrees at all times during the said term, to suffer and permit the said Mayor or Aldermen of the City of Mobile, and their successors in office, to use, at least two hydrants to each square within the said city, where there are pipes laid down, as often as may be necessary for washing streets, and take therefrom as much water as may be necessary therefor, and in case of a conflagation or fire of buildings, as much water as may be necessary from any and all parts of the said Water Works.

And the said Mayor and Aldermen of the City of Mobile, for themselves, and their successors in office, hereby covenant and agree (he the said Henry Hitchcock well and truly complying with all and singular the foregoing stipulations and agreements on his part to be done, performed and complied with), that he and his heirs, executors, administrators and assigns, shall and may retain the quiet possession of the said Water Works, and appurtenances, for the said term of twenty years, without let, molestation and hindrance of the said Mayor and Aldermen. or their successors in office, or any person or persons claiming by, through or under them. And that the said Henry Hitchcock, his executors, administrators and assigns shall, during the said term of twenty years, have the exclusive privilege of furnishing to the citizens and inhabitants of the City of Mobile, water from the Aqueduct or Water Works aforesaid, at a sum or price which shall at no time be less than the following rates, to be paid by the person or persons receiving the same, and payable in advance, to wit:

Twenty dollars for each family of six persons.

First—For each person in private dwellings, including servants (and persons from one to twelve years of age to be estimated as two for one), two dollars per annum.

Second.—For retail grocery stores, fifty dollars per annum each.

Third.—For grocery stores where liquor is not retailed in quantities less than one quart, twenty-five dollars per annum.

Fourth.—For dry good store, without families, twenty dollars each.

Fifth.—For liquor stores doing the business of drawing off and bottling wine and other liquors, one hundred dollars each.

Sixth.—For coffee houses, one hundred dollars each.

Seventh.—For oyster houses, one hundred dollars each.

Eighth.—For confectioneries, fifty dollars each.

Ninth.—For a bath for a private family, five dollars each.

Tenth.—For a horse, three dollars each.

Eleventh.—For a carriage, three dollars each.

Twelfth.—For the use of ships, steamboats, vessels and other water craft, per hogshead of one hundred and twenty gallons, fifty cents each hogshead.

Thirteenth.—For manufactories, hotels, taverns, boarding houses, steam mills, tanyards, brickyards, soda shops, livery stables, public baths, bakeries, dyeing, scouring and renovating establishments not enumerated, may be supplied at an annual charge according to the quantity of water that may be required, on such terms as the parties may agree.

One hundred and twenty gallons for every twenty-four hours, being estimated as the quantity consumed by a private family consisting of six grown persons. Which said rates may be increased, raised and regulated by the said Mayor and Aldermen of the City of Mobile, or their successors in office, from time to time, as may be deemed necessary and proper.

And further, he, the said Henry Hitchcock, his executors, administrators and assigns, shall have the power to have, collect and receive from each and every person or persons who shall take or receive water from the said Water Works, the rates or prices per annum which may or shall be fixed and determined on by the said Mayor and Aldermen, or their successors in office; and further, shall have the power and authority to make such alterations and repairs upon the said works, and to erect such new work, and in such manner as he may deem necessary and proper, and may at will change the fountain head, and conduct the water from any part of Three Mile Creek, so called, so that the same be good and wholesome, he, the said Henry Hitchcock, procuring at his cost, the necessary ground for the reservoir or reservoirs and that through which the pipes shall pass. And the said Mayor and Aldermen of Mobile, for themselves and their successors in office, hereby further covenant and agree, that they will at the expiration of the said term of

twenty years, (he, the said Henry Hitchcock, his executors, administrators or assigns, delivering up the said "Water Works" and appurtenances in good order and repair,) pay to him or them, the actual cost and expenses, which he or they shall have laid out, and expended, and which may be put upon the said works by him or them, or any of them, either by reason of repairs, or addition to the present works, as by alterations or improvements made upon the said Water Works during the said term of twenty years above stated.

In testimony whereof the Mayor of the said City of Mobile, in the name and by the authority of the said Mayor and Aldermen of the said City of Mobile, hath hereunto set his hand and seal of office, and the said Henry Hitchcock hath hereunto set his hand and seal the day and year first above written.

MAYOR. [L. S.]

AN ACT

TO INCORPORATE THE MOBILE AQUEDUCT COMPANY.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened*, That books of subscription for the capital stock of the "Mobile Aqueduct Company" shall be opened at the Mayor's office, in the city of Mobile, on the first Monday in January next, at ten o'clock in the morning, and continue open from ten A. M. to three o'clock P. M., from day to day, (Sunday excepted,) till the sum of one hundred and fifty thousand dollars shall be subscribed; that said subscription shall be made under the superintendence of the Mayor of the said city, and any of the Aldermen, or in the absence of the Mayor, of any two of the Aldermen of said city.

SEC. 2. *And be it further enacted*, That as soon as one hundred thousand dollars shall be subscribed, the Mayor of said city shall notify the subscribers by giving ten days notice thereof, in one of the newspapers published in the said city of Mobile, at which time the said subscribers shall meet at the Mayor's office, and choose by ballot, a President and four Directors, who shall serve until the first Monday in January next after their election, and until their successors shall be duly elected, which shall be done annually on the first Monday in January, at the office of the company, but should no election be held on that day in any year, the same may be held at any time hereafter, on giving ten days notice as aforesaid, of the time and place, by the President or any three of the Directors or stockholders.

SEC. 3. *And be it further enacted*, That the said capital stock of said company shall be divided into shares of fifty dollars each, and that ten dollars on each share subscribed shall be paid at the time of subscribing; fifteen dollars in sixty days; fifteen dollars in one hundred and twenty days, and ten dollars in one hundred and fifty days thereafter, unless the Directors shall give longer time, which shall only be done on receiving good security for the same, and should any subscriber fail to pay an installment as the same falls due, the amount paid thereon shall be forfeited to the company, and the stock so forfeited shall be re-sold as aforesaid.

SEC. 4. *And be it further enacted*, That from and after the first election, as provided by the second section of this act, the said subscribers shall constitute a body politic and corporate, by the name and style of "Mobile Aqueduct Company," and as such shall be taken, known and held in law, and shall so continue until the first day of December, 1856, and until they shall have been purchased out by the corporation of the City of Mobile, as is hereinafter provided; during which period the said Company shall have and enjoy all the rights, privileges and immunities which are contained in the act entitled "An Act to incorporate an Aqueduct Company in the City of Mobile," passed the 20th day of December, 1820, which act, except as modified by this act, is hereby revived and declared to be in force during the continuance of this act.

SEC. 5. *And be it further enacted*, That the contract made and entered into by and between the Mayor and Aldermen of the City of Mobile and Henry Hitchcock, on the first day of December, 1836, and which is recorded in the County Clerk's office in Mobile, in which the said Henry Hitchcock became the lessee of the present City Water Works, for the period of twenty years from the date thereof, be, and the same is hereby recognized and confirmed; and upon the said Henry Hitchcock and his executors or administrators assigning the same to the company hereby incorporated, which he is hereby authorized to do, the same in all its parts, shall accrue to the benefit of said company, and the said company shall be subject to all the covenants contained therein, to be performed by the said Henry Hitchcock.

SEC. 6. *And be it further enacted*, That the said President and Directors shall appoint a Secretary, and such other officers, engineers and agents as they may think proper, and the same to displace. They shall keep a general and proper record of all their proceedings, which shall be subject to the inspection of the stockholders. A statement of the affairs of the com-

pany shall be laid before the stockholders at each annual election; semi-annual dividends of such portion of the profits as the Directors shall think proper, shall be declared and paid to the stockholders. The Directors may make all needfull rules and regulations relating to the management of the Company, and the supply of water; and they shall be permitted the use of the streets in the City of Mobile, free of charge, for the purpose of laying down pipes for the conveyance of water.

SEC. 7. *And be it further enacted*, That the several incorporate Banking and Insurance Companies of the City of Mobile, except the Branch of the Bank of the State of Alabama, at Mobile, be and they are hereby authorized to subscribe a sum not exceeding ten thousand dollars each, towards the capital stock of said company.

SEC. 8. *And be it further enacted*, That as soon after the first day of December, 1856, as the said corporation of Mobile shall pay to the said company the cost of the said work in conformity with their contract, before referred to, with the said Henry Hitchcock, then this act shall cease to operate, and not before; *Provided*, that the said company shall have power to collect its debts and wind up its affairs.

Approved December 25, 1837.

ARTICLES OF AGREEMENT,

Made and entered into the twenty-sixth day of December, in the year one thousand eight hundred and forty, by and between the Mayor Aldermen and Common Council of the City of Mobile, of the first part, and Albert Stein of the second part: Witnesseth, that the said Mayor, Aldermen and Common Council of the City of Mobile, for and in consideration of the covenants and agreements hereinafter contained, mentioned and reserved on the part of the said Albert Stein, his executors, administrators and assigns, to be paid, kept, done and performed, have granted, and by these presents do grant unto the said Albert Stein, his heirs, executors, administrators and assigns, the sole privilege of supplying the City of Mobile with water from the Three-Mile Creek for twenty years, from the date of this agreement, as well as all the advantages and benefits which accrue to the said Mayor, Aldermen and Common Council from by or under an act of the Legislature of the State of Alabama, entitled an act to incorporate an Acqueduct company in the city of Mobile passed December 20th, 1820, and all ordinances

and resolutions passed by the said Mayor and Aldermen of the city of Mobile, under and by virtue of the said act, or by the act of incorporation of the said city of Mobile, and the several acts amendatory thereto, which in any way or manner relate to the said "City Water Works," or the right to supply said city with water, as well as all the benefits and advantages which accrue to the said Mayor, Aldermen and Common Couucil, or the Mayor and Aldermen of the city of Mobile, from, by or under an act of the Legislature of the State of Alabama, entitled an act to incorporate the Mobile Aqueduct Company, passed December 25th, 1837: to have and to hold the abovementioned and described privileges, together with all and singular the appurtenances unto the same belonging, or in anywise appertaining unto the said Albert Stein, his executors, administrators and assigns, from the date hereof, for, during and until the full end and term of twenty years thence next ensuing.

And the said "Mayor, Aldermen and Common Council of the City of Mobile," for themselves, and their successors in office hereby further covenant and agree, that they will at the expiration of the said term of twenty years, (he, the said Albert Stein, his executors, administrators and assigns, delivering up the said Water Works and appurtenances in good order and condition,) pay to him, his executors, administrators or assigns, their actual value, as determined by six arbitrators, three to be chosen by the Mayor, Aldermen and Common Council of the City of Mobile, and three by the said Albert Stein, his executors, administrators or assigns: *Provided*, that the said arbitrators shall not be members of the corporation of the city of Mobile. If they agree, and so report in writing, their award shall be binding on the respective parties; but in cause of disagreement, the value of the works shall be left to watering committee of the City of Philadelphia, or such committee of the City of Philadelphia, by whatever name, as may be charged with the Water Works of said city, whose decision and award in writing, reported to the Mayor, Aldermen and Common Council of the City of Mobile, shall be binding and conclusive. The amount so agreed upon shall be paid on the same day on which the said award shall be reported, and the and the water works and all appurtenances thereunto belonging, shall be delivered over to the corporation of the city of Mobile, by the said Albert Stein, his executors, administrators or assigns.

And the said party of the first part, hereby covenant and agree with the said party of the second part, his executors, administrators and assigns, that he, his executors, administra-

tors and assigns, shall have quiet possession of the said works, during their erection and after they shall be completed, for the term of twenty years, and for any further time, until the said parties of the first part, or their successors in office, shall redeem the said works from the said party of the second part, his heirs executors, administrators or assigns, according to the aforesaid stipulation.

And further, that they shall, as soon as possible, obtain from the Legislature of the State of Alabama, an act sanctioning this agreement, and the stipulations thereof, as herein contained, with such other provisions as may be inserted by consent of the said parties:

And the said Mayor, Aldermen and Common Council of the City of Mobile, for themselves and their successors in office, hereby covenant and agree, (he the said Albert Stein, his executors, administrators and assigns, well and truly complying with all and singular the within stipulations and agreements on his part, to be done, performed and complied with), that he and his executors, administrators and assigns, shall and may retain quiet possession of the said Water Works, for the said term of twenty years, without let, molestation or hindrance of the said Mayor Aldermen or Common Council, or their successors in office, or any person or persons claiming by, through or under them:

And that the said Albert Stein, his executors, administrators and assigns shall, during the said term of twenty years, or any further time, until said works are redeemed as above stipulated, have the exclusive privilege of supplying to the citizens and inhabitants of the City of Mobile, water from the Water Works aforesaid, at the sum or price which shall at no time exceed the following rates, to be paid by the persons receiving the water, and payable in advance, to wit:

First.—For every family consisting of six persons, twenty dollars per annum, and two dollars for every person additional, (and persons from one to twelve years of age are to be estimated as two for one.)

Second.—For retail grocery stores, where liquor is not retailed, twelve dollars per annum.

Third.—For retail grocery stores where liquor is sold in quantities less than one quart, from twenty to fifty dollars per annum.

Fourth.—For liquor stores doing the business of drawing off and bottling wine and other liquors, from thirty to seventy-five dollars per annum.

Fifth.—For stores without families, offices, &c., twelve dollars per annum.

Sixth.—For baths for private families, five dollars each per annum.

Seventh.--For a horse, three dollars per annum.

Eighth.--For a carriage, three dollars per annum.

Ninth.—For the use of ships, steamboats and other water craft, per hogshead of one hundred and twenty gallons, fifty cents each.

Tenth.—For coffee houses, oyster houses, confectioneries, manufactories, hotels, taverns, boarding houses, steam mills, tanyards, brickyards, soda shops, livery stables, public cabs, bakeries, dyeing, scouring and renovating, and other establishments, not herein enumerated, may be supplied at an annual charge according to the quantity of water that may be required, on such terms as the parties may agree upon; and further, the said Albert Stein, his executors, administrators and assigns, shall have the power to collect and receive from each and every person or persons who shall take and receive water from the Water Works aforesaid, the foregoing rates or prices per annum.

And further, shall have power and authority to conduct the water from any part of the "Three Mile Creek," so-called, so that the same may be good and wholesome, he, the said Albert Stein, his executors, administrators or assigns, procuring at his or their expense, the necessary ground for the reservoir, engine and pump house, and that through which the pipes shall pass:

And the said Albert Stein, for himself and his executors, administrators and assigns, doth hereby covenant and agree, to and with the said party of the first part, and their successors in office, that he will introduce the water into the City of Mobile within the space of two years, from the date thereof, so that the said City of Mobile, and the inhabitants thereof, may at all times be supplied with such a quantity of water as may procured through the said pipes, as far as they are laid:

And further, the said Albert Stein, covenants and agrees, at all times, during the said term of twenty years, to suffer and permit the said Mayor, Aldermen and Common Council of the City of Mobile, and their successors in office, to use two fire plugs, and no more, at one time, within the said city, where the pipes are laid down, as often as may be necessary for washing the gutters of the streets, and in case of a conflagation of fire of buildings, as much water as may be necessary from any and all parts of the works:

And further, the said Albert Stein, covenants and agrees, as aforesaid, to surrender up to the said Water Works, and all the appurtenances thereto, to the said Mayor, Aldermen and Common Council, or their successors in office, at the expiration of the said term of twenty years from the date hereof—they, the said Mayor, Aldermen and Common Council, or their succes-

sors in office, paying to the said Albert Stein the value of the works, determined as above mentioned.

And further, that the said Albert Stein, for himself and his executors, administrators and assigns, doth hereby covenant and agree, to and with the party of the first part, that he will pay or cause to be paid unto the said Mayor, Aldermen and Common Council, or their successors in office, for the pipes which they have on hand, and those laid in the ground, which may be found fit for use, the same rates and prices and on the same terms as pipes of the same size and quality may be procured at, to be delivered in Mobile at the time when he, the said Albert Stein, may take into possession and use the said pipes, now belonging to the said Mayor, Aldermen and Common Council.

And further, it is understood between the contracting parties hereto, that as soon as the water is introduced under this agreement, the present Water Works shall be abandoned and totally discontinued.

And further, the said Albert Stein doth hereby covenant and agree to place and so arrange the fire plugs that there shall be four fire plugs applicable to each square of ground where the pipes are laid.

It is further agreed and understood between the parties hereto, that the party of the second part, his executors, administrators or assigns will grant to the corporation the use of the water for the City Hospital and Guard House free of charge.

It is further agreed and understood between the parties hereto, that if the party of the second part does not introduce the water into the city within two years, from the date of this contract, he will forfeit not only the privilege and advantages of his contract, but also all the improvements and the expenses that he may have incurred: the same to inure to the use and benefit of the city.

It is further agreed and understood between the parties hereto, that the party of the second part, hereby covenants and binds himself, his heirs, executors, administrators and assigns, in the penal sum of ten thousand dollars, that he will commence the aforesaid works within one month after obtaining the consent of the Legislature of the State of Alabama to the stipulations, agreements and transfers herein made and contained, and that he will prosecute said work to completion with due speed and diligence.

(Signed) EDWARD HALL, *Mayor*.

[L. S.] ALBERT STEIN,
per pro. LEWIS TROOST.

Attest:
H. F. ENSIGN, *Clerk*.
per pro. JNO. P. REMY.

AN ACT

FOR THE PROMOTION OF THE HEALTH AND CONVENIENCE OF THE CITY OF MOBILE, BY THE INTRODUCTION OF A SUPPLY OF WHOLESOME WATER INTO SAID CITY, TO BE USED FOR DOMESTIC PURPOSES AND THE EXTINGUISHMENT OF FIRES.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Alabama, in General Assembly convened*, That the agreement made and executed by and between the Mayor, Aldermen and Common Council of the City of Mobile, of the one part, and Albert Stein of the other part, bearing date the 26th day of December, A. D. 1840, be, and the same is hereby fully confirmed.

SEC. 2. *And be it further enacted*, That all the rights, powers, privileges and immunities which were granted to the Mobile Aqueduct Company, and to the Mayor and Aldermen of the City of Mobile, by an act of the General Assembly of the State of Alabama, passed on the 29th day of December, 1820, not inconsistent with the terms of the before-mentioned agreement, be, and the same is hereby, granted, vested in, and confirmed to the said Albert Stein and his assigns.

SEC. 3. *And be it further enacted*, That all the rights, powers, privileges and immunities which were granted to the Mobile Aqueduct Company, and to the Mayor and Aldermen of the City of Mobile, by an act of the General Assembly of the State of Alabama, passed on the 25th day of December, 1837, not inconsistent with the terms of the before-mentioned agreement, be, and the same are hereby granted, vested in and confirmed to the said Albert Stein and his assigns.

SEC. 4. *And be it further enacted*, That the said Albert Stein and his assigns, by themselves and their agents, shall have full power and authority to use such of the public roads in the county of Mobile as may be in the direct route between the resorvoir and the fountain head of the Water Works hereby to be erected, and the City of Mobile, for the purpose of laying the pipes for conducting the water into said city free from all charge or claim for damage; therefore provided, that the said Albert Stein and his assigns, shall, at their own proper cost and charge, keep and preserve any portion of any of the said public roads, so used by them as aforesaid, in full and complete repair so long as the same may be used by them as aforesaid.

SEC. 5. *And be it further enacted*, That the said Albert Stein and his assigns shall have full power and authority to dispose of any and all of the aforesaid privileges, rights and immuni-

ties by deed, and that the said Albert Stein and his assigns may mortgage the said privileges, rights and immunities, by deed, to all and every person or persons whatsoever, and that the grantees of said Albert Stein and his assigns shall take and enjoy all and every right, privilege and immunity which the said Albert Stein might or could enjoy by virtue of the aforesaid agreement, and this act, whether the same be granted absolutely or by way of mortgage or pledge.

Approved January 7th, 1841.

Supreme Court of the United States.

LOUIS STEIN, *Executor*,
vs.
THE BIENVILLE WATER SUPPLY CO. } No. 1,396.

Motion to Advance.

The appellant moves the Court to advance this cause and set the same down for argument at the earliest day convenient to the Court.

In support of the motion he submits the following considerations:

The subject involved in the litigation is the water supply of the city of Mobile, a municipality with a population of over 30,000 inhabitants. The parties are, on the one hand, the executor of Albert Stein, who, by contract with the city, made in 1840, and by virtue of legislative acts claims the exclusive right to supply the city with water. Having constructed the water works, he continually exercised that right without question until the legislature of Alabama, in 1883, passed the act incorporating the defendant company, in hostility to the right of Stein, by conferring upon it a franchise to supply the city with water.

The Bienville Company being about to lay down its mains and pipes in the streets of Mobile for the purpose of conducting water into the city, Stein, on the 25th of April, 1887, filed his bill in the United States Circuit Court for the Southern District of Alabama, for an injunction to restrain such action. His claim was that the act of 1883, and subsequent acts amending the charter of defendant company, impair the obligation of his contract.

To this bill there was a demurrer filed by the defendant. On the hearing of this demurrer, Judge Toulmin, dismissed the bill, holding the act of 1883 to be valid, and that complainant's exclusive right was limited to supplying the city with water from a certain stream called "Three Mile Creek.

Complainant appeals from this decree.

It is submitted, that the cause is one of public importance and exigency, and should receive the early consideration of this Court.

The definite and speedy settlement of the conflicting claims of the respective parties to the right to supply the city with water, concerns the interest of a large population in a matter of the utmost consequence to their welfare.

However disinclined the Court may be to interfere with the regular order of the docket, we submit that this case most strongly appeals to that power of preference which may be exercised under Rule 26.

W. HALLETT PHILLIPS,
For Appellant.

Office Supreme Court U. S.
FILED.
APR 21 1891
JAMES H. MCKENNEY

Supreme Court of the United States.

OCTOBER TERM, 1890.

LOUIS STEIN, AS EXECUTOR, &c., APPELLANT,

VS.

THE BIENVILLE WATER SUPPLY CO., APPELLEE.

BRIEF OF L. H. FAITH FOR APPELLANT.

Supreme Court of the United States

OCTOBER TERM, 1890.

LOUIS STEIN, as Executor, &c., Appellant,

vs.

THE BIENVILLE WATER SUPPLY CO., Appellee.

BRIEF OF L. H. FAITH FOR APPELLANT.

The appellant, Louis Stein, as executor of Albert Stein, deceased, brought this suit for the purpose of enjoining the appellee—The Bienville Water Supply Company—from constructing into the city of Mobile, through pipes and conduits, and furnishing and supplying the same to the inhabitants thereof, and *from molesting or hindering complainant in the full and exclusive right and privilege of supplying the City of Mobile and the inhabitants thereof, with water under his said contract of December 30th, 1840.* [See prayer to bill, printed Record, page 7.

The contract under which complainant claims the exclusive right and privilege of supplying water to the City of Mobile and the inhabitants thereof was ratified and confirmed by Act of the Legislature, approved January 7th, 1841. This Act and the Contract incorporated therein, is attached to the bill as Exhibit D. [See printed Record, pages 16 to 20, inclusive.

The material portions of the contract, according to my view of the case, are as follows:

"Sec. 4, &c. That the said Mayor, &c., * * have granted and by these presents do grant unto the said Albert Stein, his heirs, executors, administrators, or assigns, the sole *privilege of supplying the City of Mobile with water*, from the Three Mile Creek for twenty years from the date of this agreement, as well as all the advantages and benefits which accrue to the said Mayor, Aldermen and Common Council from, by, or under an

of the legislature of the State of Alabama, entitled 'An act to incorporate an Aqueduct Company in the City of Mobile,' passed December 20th, 1820, and all ordinances and resolutions passed by the said Mayor and Aldermen of the City of Mobile under and by virtue of the said act, or by the act of incorporation of the said City of Mobile and the several acts amendatory thereto, *which in any way or manner relate to the said City Water Works, or the right to supply said city with water*, &c., * * to have and to hold the above mentioned and described privileges, together with all and singular the appurtenances unto the same belonging or in anywise appertaining, unto the said Albert Stein, his executors, administrators, and assigns, from the date hereof for, during, and until the full end and term of twenty years thence next ensuing. * * * * *

And the said party of the first part (the City of Mobile) hereby covenant and agree with the said party of the second part, his executors, administrators, and assigns, that he, his executors, administrators, and assigns, shall have quiet possession of the said works, during their erection and after they shall have been completed, for the term of twenty years, *and for any further time until the said parties of the first part or their successors shall redeem the said works* from the said party of the second part, his heirs, executors, administrators, and assigns, according to the aforesaid stipulation. * * That he and his executors, administrators and assigns shall and may retain quiet possession of the said water works for the said term of twenty years without let, molestation or hinderance of the said Mayor, Aldermen and Common Council, or their successors in office, *or any person or persons claiming by, through, or under them, and that the said Albert Stein*, his executors, administrators and assigns *shall during the said term of twenty years or any further time, until said works are redeemed, as above stipulated, have the exclusive privileye of supplying to the citizens and inhabitants of the City of Mobile, water from the water works aforesaid*, at the sum or price which shall at no time exceed the following rates, &c. * * *

And, further, it is understood between the contracting parties hereto that as soon as the water is introduced under this agreement the present water works shall be abandoned and totally discontinued."

The foregoing extracts from the contract show not only the *grant* of the exclusive right or privilege claimed, but also the *covenant* of the city that the right and privilege so granted of

supplying water to the citizens and inhabitants of Mobile from, or by aid of, the water works, should be exclusive in the grantee under the contract.

It will be observed that the granting clause of the contract gives to the grantee all the advantages and benefits accruing to the city under the act of December 20th, 1820. On page 9, printed Record, will be found the 3d section of that act which is as follows:

"Sec. 3. And be it further enacted by the authority aforesaid, That the said corporation and their successors shall have *and enjoy the exclusive right and privilege of conducting and bringing water for the supply of said city for the space of forty years; provided*, the said corporation or their successor shall, before the expiration of three years from the passage of this act, cause to be conducted the water from the said bayou or creek to the said City of Mobile in the manner hereinbefore proposed; And provided also, that after the expiration of the said term of years the water works shall become the property of the said city and shall be for the use of the inhabitants thereof forever," &c.

On December 24th, 1824, the charter of the City of Mobile was amended by act of the legislature of Alabama, and by section 18 of that act the franchise, etc., granted to the "Aqueduct Company" under the act of December 20th, 1820, was vested in the City of Mobile. That section is found on page 1, printed Record, being incorporated in the 2d paragraph of the bill, and reads as follows:

"Sec. 18. And be it further enacted, That the act entitled 'An act to incorporate an Aqueduct Company in the City of Mobile,' passed December the twentieth, eighteen hundred and twenty, be, and the same is hereby null and void; and the said corporation having failed to comply with the requisitions of said act, and all the rights, privileges and immunities, powers, prerogatives, and authority which appertained to the said company by virtue of the aforesaid act are hereby transferred to and vested in the said corporation of the City of Mobile for the use and benefit of the inhabitants thereof."

The bill shows further, that from 1824 to 1836, very little progress was made in the erection of the water works and the introduction of water into the city; that in 1836 the City of Mobile entered into an agreement with one Henry Hitchcock whereby the city leased to him the water works and privileges, &c.,

for twenty years; that Hitchcock obtained in December 1837, an act incorporating a new "Aqueduct Company," but said Hitchcock dying shortly after obtaining the charter, it seems no organization of that company was effected, and the building up at that time of a new and adequate water works plant fell through and all the property again passed into the possession of the city.

The bill then shows the inability of the city to undertake the work, and its inability to get capitalist to take hold of it without securing to them the *exclusive right and privilege of supplying water to the* exclusion of all persons or companies for a certain fixed time, and thereafter until the city should redeem or purchase the plant, or works, and that the contract with Albert Stein was made under these circumstances and with the inducement held out to him that no competing water works should be allowed. In fact the contract stipulates that as soon as water was introduced by the Stein works, the then existing system or plant should he abandoned and totally discontinued.

The bill shows that Mr. Stein at a cost of over $200,000 built a system of water works in strict conformity to the contract, and that the same has all the time been kept in good condition and that the contract has in all respects been faithfully observed by the complainant and his testator; that although the twenty years have elapsed, yet the city has not redeemed or purchased or offered to redeem or purchase said water works as by said contract it agreed to do.

The bill then charges that the obligation of this contract so made with Albert Stein has been greatly impaired, if not destroyed by the act of the legislature of Alabama, (Exhibit G to bill, printed Record, pages 23 to 29), incorporating and granting to the Bienville Water Supply Company—the appellee—the right and privilege of furnishing and supplying water to the inhabitants of the City of Mobile by a system of public water works.

Appellee demurred to the bill and assigned fifteen causes of demurrer all of which the court below sustained except the 6*th*, 7*th*, 8*th*, 9*th* and 10*th*. The grounds or causes of demurrer sustained by the court succinctly stated are:

1st. That there is no equity in the bill.

[1st. cause of demurrer, printed Record, page 31.

2d. That the exclusiveness of complainant's privilege or franchise is limited to taking water from the Three Mile Creek to

furnish to the City of Mobile and [illegible] show that defendant does not propose to [illegible] of the complainant, but on the contrary [illegible] supply water to the city from another and [illegible]

[See 2d, 3d, 4th, 5th, 11th and 12th grounds of demurrer, printed Record, pages [illegible].

3d. That complainant's exclusive right to [illegible] the City of Mobile, &c., is limited to furnishing [illegible] water works, and that defendant does not propose to [illegible] with that right.

[13th ground of demurrer, printed Record, page [illegible].

4th. That complainant's exclusive right to furnish [illegible] to the City of Mobile has long since expired, and that its only right is to furnish water *free of charge*, which right defendant does not propose to interfere with.

[14th ground of demurrer, printed Record, page [illegible].

5th. That the act incorporating and granting to the Mobile Water Supply Company the right to supply water to the City of Mobile is justified on the ground that it is for the preservation of the health of the citizens of Mobile and therefore within the scope of the legislative power although it may be in derogation of complainant's right.

[15th ground of demurrer, printed Record, page 33.

The court below sustained each of the grounds of demurrer above referred to and dismissed the bill absolutely.

1.

As to the first ground of demurrer, viz: "Want of equity in the bill," I will say this, that the learned District Judge who presided in the Circuit Court and heard said motion and demurrers has differed from Mr. Justice Harlan who heard the motion for a preliminary injunction and granted the same to the extent of protecting complainant against any acts of the defendant tending to molest, interfere with, or injure the [illegible] conduits, or contrivances now constructed or hereafter constructed by complainant for the purpose of supplying the City of Mobile and its inhabitants with water pursuant to the ordinance of December 26th, 1840.

See 32 Federal Reporter, page [illegible].

There certainly was and is equity in the bill to [illegible] least of the grievances which defendant was [illegible]

submitting by the preliminary injunction granted by Mr. Justice Harlan, else no restraining order would have been granted.

2.

But the principal questions in the case are: 1st. The proper construction of the contract of December 26th, 1840, confirmed by the act of January 7th, 1841. 2d. Whether that contract has, or not expired; and 3d. Whether the act incorporating and granting to the Bienville Water Supply Company the exclusive right to furnish water to the City of Mobile, &c., in derogation of appellant's right was a legitimate exercise of legislative power for the health of the citizens of Mobile.

3.

In the opinion of the lower court the learned Judge says:—"If am right in the conclusions already reached in this case and herein announced, the point raised by the counsel for defendant, that the contracts under consideration are those in which the public health are involved and may be modified or abrogated at the will of the legislature, is of no consequence and need not now be decided." [Printed Record, page 42.

Yet the court sustained the 15th ground of demurrer, which is as follows:

"According to the allegations of the bill it appears that in the enactment of the charter of the Bienville Water Supply Company, a copy of which is attached as an exhibit to the bill, the General Assembly of the State of Alabama did not go beyond its legitimate power in legislating for the protection of the health of its citizens, but acted in a manner and to an extent which were within the scope of its authority."

If the opinion of the court as to this question is right, the decree sustaining the 15th ground of demurrer is wrong, because repugnant to the opinion of the court. The demurrer asserts the right of the State to take from appellant the "*exclusive franchise*" and grant the same to appellee upon the mere assertion that it does so for the protection of the health of its citizens. Yet in the opinion of the learned Judge presiding at the trial, this is not law.

The preamble to the act incorporating the Bienville Company assumes and declares that the inhabitants of the City of Mobile, &c., are not provided with an adequate supply of water,

&c., and the act then authorizes to give to them ... exclusive right to furnish the supply.

It may be contended in this court, as was done in the lower court, that this is an ascertainment that appellant has complied with its contract and therefore the legislature has the lawful right to declare a forfeiture of the Stein "franchise" and vest it in the Mobile Company.

But is it not a well settled rule of law even in such cases that the substantial privileges conferred by the first grant cannot be repealed, impaired, or changed in opposition to the will of the grantee of the franchise without default, on his part; "*provided that such default must be judicially ascertained and declared.*"

Woodfork vs. Union Bank, 3 Gold (Tenn) 430.
Young vs. Harrison, 6 Georgia, 130.
State vs. Tombeekbee Bank, 2 Stewart (Ala.), 30.
Commonwealth vs. New Bedford Bridge, 2 Gray, 339.
St. Tammany Co. vs. New Orleans Co., 120 U. S. R., 64.
23 Pick. 360-363.

It is not denied that the complainant, in the enjoyment of the franchise granted to his testator, is subject to the police power of the State. But it is submitted that, "*Any attempt, under the guise of police regulations, to repeal, amend, or abridge any of the rights and privileges granted would of course be unconstitutional and void.*"

Tiedman's Police Power, p. 584.
Joseph vs. Randolp, 71 Ala., 499.
St. Tammany vs. New Orleans Co., Supra.
New Orleans Gas Co. vs. Louisiana Light Co., 115
U. S. R., p. 650, and authorited there cited.

The Supreme Court of Pennsylvania speaking on this subject, said: "If this power can be invoked for the purpose of enabling a State to revoke its grant, violate its contract, or take the property of an individual for public or private use, without compensation, it is a most dangerous power, and enables the legislature to do that which is expressly forbidden by the Constitution." 66 Penn St. on page 73.

If it were true that the "Stein works" does not furnish an adequate supply of water, still would not the State be bound in good faith not to do anything to impair the contract made by the City of Mobile, with its sanction and approval, when all the circumstances of the case, as shown by the bill and exhibits, [illegible]

taken into consideration. Should it not, before resuming or impairing the franchise, require the City of Mobile to pay for the works according to the agreement made with Mr. Stein in 1840? Referring to some of the facts of the case, we find that in the preamble to the act of December 20th, 1820, it is stated that to build the works, "*would be attended with too much labor and expense to be effected by laying a tax for the purpose*," (printed Record, pages 7 and 8), and therefore, the franchise was granted to a corporation, which failed to build the "works," and in December 1824, the franchise was granted by the State to the City of Mobile (printed Record, p. 1); that the City of Mobile then began the work and had in 1836, erected the plant at Spring Hill where the fountain was then situated, and had "*wooden and iron pipes and logs* already laid down, consisting of about sixteen thousand feet of *three inch caliber* and six thousand feet of *six inch caliber*," which it then leased to Judge Hitchcock (printed Record, page 22); that owing to the death of Hitchcock the "works" were again repossessed by the city about 1840, and then the contract was made with Stein, one of the terms of which, required Stein "*to pay or cause to be paid unto the said City of Mobile for the pipes which they have on hand and those laid in the ground which may be found fit for use, the same rates and prices and on the same terms as pipes of the same size and quality may be procured at*, to be delivered in Mobile at the time when he, the said Albert Stein, may take into possession and use the said pipes now belonging to the city." [Printed Record, page 19.

The contract further provides that said Stein should supply to the city "*such a quantity of water as may be procured through the said pipes as far as they are laid*" (printed Record, pages 18 and 19); and that the city would at the expiration of the twenty years pay to said Stein the *actual value* of the "*works*" *to be determined by six arbitrators* (printed Record, page 17); and also, that as soon as water was introduced under this agreement the old water works should be abandoned and totally discontinued. [Printed Record, page 19.

Do not these facts show that if the *caliber* of the pipes are too small to furnish an adequate supply of water that the fault is that of the city and not Mr. Stein's, as they were selected by the city and Mr. Stein was required to buy and use them. The city having agreed to repurchase the works at its *actual value* at the expiration of twenty years deemed it best not to contract for

larger pipes or a more expensive plant. So then if the exclusive franchise was granted to Mr. Stein to furnish water to the city and the grantor of the franchise named the source from which the water should be taken and the *caliber* of the pipes through which it should be furnished and required the grantee to furnish only "such a quantity of water as may be procured through said pipes as far as laid," and the grantee has faithfully complied with his part of the agreement, which is admitted by the city, would it be just and equitable and lawful for the State after the expenditure by Mr. Stein of over $200,000 in constructing the works in strict compliance with the contract, to take from him the franchise without compensation and in violation of the express agreement that he should be paid its actual value at the expiration of the twenty years? It must be admitted by all that it would not. Then, if the State would not be allowed to revoke the grant, or destroy the contract entirely by direct action, will it be permitted to do so by indirection, as by impairing the value of the franchise in granting to another the franchise and right to compete with appellant in supplying water to the same municipality and people by a system of water works?

This court said in the case of Planters Bank vs. Sharp, 6 Howard, 301: "One of the tests that a contract has been impaired is, *that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force.*"

The *value* of Stein's *contract* depended very largely on the fact that under it he had the exclusive right to furnish and sell water at rates which he would *not be forced to diminish on account of competition*, while at the same time the city was guarded against exorbitant charges by fixed maximum rates.

In the case of New Burgh Turn-pike Co. vs. Miller, 6 Johns. Ch. on pages 110, 111 and 112, Chancellor Kent said: "Considering the proximity of the new bridge, and the facility that every traveller has, by means of that bridge and the road connected with it, to shun the plaintiffs' gate, which he would otherwise be obliged to pass, I cannot doubt for a moment, that the new bridge is a direct and immediate disturbance of the plaintiffs' in the enjoyment of their privilege. The *quo animo* is not an essential inquiry in the case, whatever may have been the intention of the defendants, the new road and bridge do directly and materially impair the use and *value* of the plaintiffs' franchise.

* * * The proximity of the new road, and the proximity of the two bridges, is so close and striking, as to render the same a most palpable and immediate annoyance and interruption to the enjoyment of the plaintiffs' toll bridge. The new road, by its *termini*, and its vicinity, creates a competition most injurious to the statute franchise, and becomes, what is deemed in law, in respect to such a franchise, a nuisance. * * * It was observed in the case of Ogden vs. Gibbons, 4 Johns. Ch. 150, and shown to be a principle of the common law, that if one had a ferry by prescription, and another erected a ferry so near it, as to draw away its custom, it was a nuisance, for which the injured party had his remedy by action. * * * The same doctrine applies to *any exclusive privilege created by statute; all such privileges come within the equity and reason of the principle; no rival road, bridge, ferry, or other establishment of a similar kind, and for like purposes, can be tolerated so near to the other as materially to affect or take away its custom. It operates as a fraud upon its grant, and goes to defeat it.* The consideration by which individuals are invited to expend money upon great, and expensive, and hazardous public works, roads, and bridges, and to become liable to keep them in constant and good repair, is the grant of a right to an exclusive toll. This right, thus purchased for a valuable consideration, cannot be taken *by direct or indirect means, devised for the purpose, both of which are equally unlawful.*"

See also, Croton Turnpike Co. vs. Ryder, 1 Johns. Ch., 611.
Livingston vs. Van Ingen, 9 Johns. Ch., 569.
Darmouth College Case, 4 Wheat, 518.
Green vs. Biddle, 8 Wheat, 17.
Fletcher vs. Peck, 6 Cranch, 136.
The Binghampotn Bridge Co., 3 Wallace, 51.
N. O. Gas Co. vs. La. Gas Co., 115 U. S. R., 650.
N. O. Water Works vs. Rivers, 115 U. S. R., 674.
La. Gas Co. vs. Citizens Gas Co., 115 U. S. R., 683.

4.

Does not the contract of 1840, as ratified by the act of 1841, vest in Mr. Stein an *exclusive* privilege or right to supply water to the city by means of a *water works system?* If we understand our opponents, their contention is, that the *exclusive feature* of the Stein contract appertains to the source or creek from which the water is to be taken, and not to the *franchise* of supplying, or

vending the water to the citizens of Mobile. In substance their contention, if we understand them, is, that Mr. Stein was granted the sole and exclusive privilege of taking water from the Three Mile Creek to supply to the people of Mobile, and not the exclusive right to furnish water to the people of Mobile; and that the city covenanted with Mr. Stein that he should have the exclusive right to *use his own water works plant in supplying water to* the city; and not that he should have the exclusive right of supplying water to the people of Mobile by means of a water works system to be erected by him under the contract. And further, that whatever right Stein had, has long since expired.

This contract made by the city with Mr. Stein has been before the Supreme Court of Alabama several times for construction as to the rights and privileges Mr. Stein acquired thereunder.

In 1849 (16 Ala. Report on page 217), Dargan, J. speaking for that court, said: "Under this *contract* and these several acts, it is clear that the plaintiff (Stein), is entitled to all the rights and benefits granted and conferred by the act of the 20th of December, 1820, and is entitled to one-half of any forfeiture incurred under the 4th section thereof, if such forfeiture be sued for by a common informer. *He occupies the place and stand of the city during his lease, is possessed of all the rights that had been previously conferred on the city in reference to the water works,*" &c.

Again in 1850 (17 Ala. R. on page 239), Dargan, C. J. speaking for the court, said: "The contract grants to Stein *the sole privilege of supplying the City of Mobile with water from the Three Mile Creek for the term of twenty years, with all the rights and advantages that the city possessed by or under an act passed the 20th of December*, 1820, *entitled* 'An act to incorporate an Aqueduct Company in the City of Mobile,' *and also all the rights and advantages derived from any other act relating thereto or amendatory thereof;* and at the expiration of said term, the right is reserved to the city to take the water works upon paying to Stein the value thereof, to be ascertained in the mode prescribed by the agreement. *The inducement to Stein to enter into this agreement was the right to charge all who might use the water at certain prescribed rates*, except so far as he was bound to furnish the city with water free of charge, for the purposes specified in the agreement."

The court held in that case that the right to vend the water was the "*franchise*" granted, and which should be estimated in

connection with the tangible property in ascertaining its taxable value.

Again, in 1854 (24 Ala. R. on pages 144, 145, 146 and 147), where Mr. Stein claimed and asserted that the rights, privileges, &c., granted to him included the right to divert and use the waters of Three Mile Creek, and which right appellee now contends was the only one granted, yet, the Supreme Court of Alabama in that case in construing the contract said (on pages 144 and 145): "*The third section* (act of 1820) *gives to the company the exclusive right of conducting the water to the city, for a term of years, on certain conditions*, one of which is, that the canal shall not be carried through any person's land without the consent of the owner. The other sections regulate the water rates to be charged by the company, and prescribes penalties for injuring the logs in which the water is conveyed, cutting the hydrants, obstructing the creek above the water works, and using the water in the city without paying for it. By the act of 1841, all the rights, privileges, and immunities granted under the act of 1820 are vested in the plaintiff in error, (Stein). * * The first and most material question involved in this case is, whether the act of 1820 confers upon the company any *right to the use of the water in the creek?* * * With the provisions intended for the protection of property which are found in the statute, in the absence of any express provision conferring the right, or any one from which it can fairly be deduced, *we must hold that the act of 1820 conferred no authority* to divert the water. * * To hold that a municipal corporation can, from the mere fact of owning land upon a water course, acquire the right to divert the water in sufficient quantities to supply the domestic wants of its inhabitants, residing at a distance of from three to five miles, to the injury of the other proprietors, would be unreasonable in itself, and unjust to those who have an equal right to participate in the benefits of the stream."

See same case, 27 Ala., page 104.

So, Mr. Stein had to buy the right to *use the water of Three Mile Creek*. The city had no right whatever to divert the water of that creek which it could grant to any one, hence, the "*exclusive privilege*" granted must refer to that which it was competent for the granting party to give, viz: "*The exclusive right of conducting the water to the city, and vending the same at prescribed rates.*" *Ut res magis, valeat quam pereat.*

Again, in the case of Stein vs. Mobile & Watson, 24 Ala., on page 344, the Supreme Court of Alabama said:

"By the act of January 7th, 1841, and an agreement previously entered into with the corporation of Mobile, Albert Stein became vested *with all the rights and immunities of the Mobile Aqueduct Company,' as chartered in 1830, and amended in 1836, and subject to all the duties to which, by law, that company was subject; the principle of which was, to supply such citizens of Mobile with water as would observe all reasonable and proper by-laws and regulations, and pay the lawful rates.*"

Again, in the case of Stein vs. The City of Mobile, 24 Ala., on page 621, the Supreme Court of Alabama in passing upon this contract said: "We must look to the nature of the works, and determine their character when viewed as a whole. The aqueducts, the reservoir, the land on which it is located, the pipes and appliances for conducting the water to the various houses, and its distribution, all connected, can with no propriety of speech be called personal estate; but the materials, thus united, are fixtures, *and the exclusive right to vend the water, as predicated upon this combination, is an easement or franchise*, incorporeal, yet partaking of the nature of the subject matter to which it is attached. * * We are of opinion, that Mr. Stein, being the owner of *this franchise* for twenty years, *and in perpetuity unless redeemed* by the city after that period," &c.

Here, the Supreme Court of Alabama decides that the "*franchise*" granted to Mr Stein embraced the "*exclusive right to vend the water*" and that he was the owner of *that franchise in perpetuity* unless the city redeemed it under the contract.

Again, in 1873—long after the expiration of the twenty years in which the city could not redeem the works—an attempt was made to require Albert Stein to pay a city license to carry on the business of "water works." A case was made up and presented to the Supreme Court of Alabama to determine whether the city was restrained by the contract of 1840 from exacting said license tax. This necessarily involved the determination of the question as to whether or not the contract had expired with the twenty years, and also, whether or not the exacting of a license was a *molestation* or *hindrance* of Mr. Stein in the operation of the works under the contract. On these questions the court said:

"The corporate authorities of the City of Mobile having entered into a contract with Albert Stein on the 20th day of December, 1840, by which they transferred to him certain water works then belonging to the city, for the term of twenty years, and until said water works were redeemed by the city as therein provided; *granting to him the exclusive privilege of supplying said city with water during said term*, and stipulating that, on his performance of all the duties imposed upon him by said contract, he shall and may retain quiet possession of said water works during said term, without let, molestation or hinderance, on the part of the city; the corporate authorities of said city cannot, *during the continuance of said contract*, require the said Stein to pay a license or tax, for carrying on said business within the limits of the city."

49 Ala., p. 362, Head notes.

In 1875 the contract was again before the Supreme Court of Alabama for construction. Mr. Stein insisted that he was not liable to the city for taxes assessed against the property, because the property belonged to the city and he was the mere lessee of it for a term which had expired, but the Supreme Court reaffirmed the decisions in the 17th and 24th Alabama Reports hereinbefore referred to, and said further: "By the act of 1820, the privilege was conferred on a private corporation created by it and called 'The Mobile Aqueduct Company,' *exclusive* of all other persons, *to supply the City of Mobile with water for a space of forty years from that date.* It having failed to comply with the provisions of the law, *all the right, privileges, powers, and immunities granted to it* were by an act of the legislature in the year 1824, granted to the City of Mobile. After several endeavors in various ways, all which had failed of success, to accomplish the purpose of having a sufficient quantity of water conducted into the city for the use of the inhabitants, the municipal authorities entered into a contract with Mr. Stein, in December 1840, by which in effect, they consented upon terms stated in the agreement, to convey to him all the property and material the city owned and had, applicable to that purpose; *and to relinquish in his favor the privilege which it had*, and to aid in procuring from the General Assembly its grant to him of the sole privilege of supplying the City of Mobile with water from the Three Mile Creek for twenty years from the date of the agreement, and the sole right to have, possess, and operate the water works erected for that purpose, after said period of twenty years until the city should purchase

them of him at their fair value, to be ascertained as provided in the agreement. * * * *

By the act of the General Assembly of January 7th, 1841, the provisions of this agreement were confirmed and enacted into a law; *and all the rights, powers, privileges and immunities*, not inconsistent with the terms of the agreement, which were granted to the Mobile Aqueduct Company, and to the Mayor, &c., of Mobile by an act passed December 20th, 1820, and by an act passed December 25th, 1837, were vested in and confirmed to Stein and his assigns. * * This enactment founded upon, and incorporating in it, the agreement, was not a lease but a charter to Stein. It has been so regarded by this court. *It conferred upon him, franchises derivable only from the sovereign authority, obtained, it is true, with the concurrence and aid of the city, but still a grant from the State of intangible privileges, which gave to the corporeal property its chief value.*"

54 Ala. on pages 27 and 28.

Is it not clear and plain from the grant itself, and from the construction placed upon it by the highest court of the State of Alabama that the grant to Mr. Stein by the State was not corporeal property, but a "*franchise, charter* or *intangible privilege*" which gave to the corporeal property its chief value? What then was this intangible *privilege, franchise* or *charter*? It was not the right to use, or divert from its natural course, the water of Three Mile Creek. The Supreme Court of Alabama has held that Mr. Stein had to purchase that right from the riparian proprietors. Nor was it the grant of the right to use the corporeal property, because Mr. Stein had to purchase, build, and pay for that property, and the general law gave to him the right to use lawfully his own.

We find, however, that a "*franchise*, or *intangible privilege*" was granted to Mr. Stein, which he would have the right to hold co-extensively with the right to retain the possession of the corporeal property. This "*intangible privilege, or franchise*," is, and has been defined to be, "*the exclusive right of conducting water to the city*," by a system of water works. "*The exclusive right to vend the water.*" (24 Ala. on page 631). "*The exclusive privilege of* supplying the city with water. (49 Ala. R., page 382, and 54 Ala. R., on page 27).

This "*intangible privilege, or franchise*" gave to the corporeal

property used in connection therewith its chief value. And the *"exclusive feature"* of the grant gave to *"that franchise" its* chief value. It is not at all likely that Mr. Stein would have purchased the corporeal property and bound himself to build a water works plant, and introduce water into the city within *two* ears from the date of the contract under a penalty of forfeiting to the city all the improvements made by him and to keep the works in constant and good repair, if he had not been granted rights and privileges corresponding with the risk, duties, and obligations assumed by himself.

The demurrers, and rulings of the court below thereon, undertake to transpose the words of the contract and make it read "that complainant had the *exclusive right to use the water works* in supplying water to the city," whereas the contract in plain words read: "And that the said Albert Stein, his executors, administrators, and assigns, shall, during the said term of twenty years or any further time, until said works are redeemed, as above stipulated, *have the exclusive privilege of supplying to the citizens and inhabitants of the City of Mobile water*, from the water works aforesaid; at the sum or price which shall no time exceed the following rates," &c. [Printed Record, pages 17 and 18.

We thus see that the *"exclusive privilege"* granted, relates to the *"supplying of water to the citizens and inhabitants*, from the water works aforesaid;" &c., the preposition *"from"* being used in the sentence in the sense of "by the aid of" the water works, &c., and this *"exclusive privilege"* is co-existent and co-extensive with the right to retain the water works property until redeemed, as stipulated in the contract.

The opinion of this court, in the case of Bridge Pros vs. Hoboken L. & I. Co., 1 Wallace, 116, and the reasoning thereof is applicable to this case. I will here use substantially the language and argument of that opinion on the point as to what was granted, viz.: "There is no doubt that it was the intention of those who framed those acts and contract set out in the bill, to confer on Mr. Stein, *some exclusive privilege*. If we can arrive at a clear and precise idea *what that privilege is*, we shall perhaps be enabled to decide whether the erection proposed by the defendant will infringe it. In the first place, it is not an exclusive right to take water from the Three Mile Creek, for there is no prohibition of others using or taking water from that stream. In the next

place, it is not a monopoly of the right to build water works, because only one is authorized to be constructed, and the old one then existing should be totally abandoned and dismantled as soon as the new one was erected. Besides, the building of a water works plant *was not the privilege, but the duty of them* under the contract; *a duty which constituted the consideration for the privilege which was granted. The right to bring the water into the city by means of conduits*, pipes, &c., that is, by means of a system of water works, and sell the same at prices the maximum rates of which are fixed by the contract, *is the privilege or franchise granted*, and that right is rendered valuable by excluding others from exercising the same or a similar right."

5.

The next question is: Has the State of Alabama passed any law, or granted any franchise, or privilege to the appellee which impairs the previous grant made to Mr. Stein? If it has, then the bill in this case was properly filed and the demurrers thereto should not have been sustained, and the bill should not have been dismissed for want of equity.

Exhibit "G" to the bill, to be found on pages 23 to 29 inclusive, of the printed Record, is the act incorporating the Bienville Water Supply Company—the appellee in this case—the 6th, 9th, 10th and 11th sections of that act, so far as it grants to the appellee the right to furnish water to citizens of the City of Mobile, is clearly repugnant to the previous "*exclusive privilege*" granted to Mr. Stein. Two *exclusive privileges* of the same and identical character appertaining to the accomplishment of the same identical object and purpose by the same means cannot, in the nature of things, coexist at one and the same time in different persons or corporations. The legislature of Alabama recognized this fact and attempted to avoid it by placing a construction of its own upon the extent of the grant to Mr. Stein, limiting and restricting the *exclusive feature* of it to taking water from the Three Mile Creek. [See Section 11, printed Record, p. 37.

An assumption of judicial authority by the legislature, however, will not aid statutes enacted for purposes of impairing the obligations of contracts, or divesting, [illegible]

Meyer, &c. vs. Horn, 26 Md., 194, and 23 Pick., [illegible]

Section 6 of the charter of the Bienville Company provides "That said corporation is hereby charged with the duty of introducing into the Port of Mobile and the village of Whistler, in Mobile county, such supply of pure water as the domestic, sanitary, and municipal wants thereof may require," &c.

It will hardly be contended that the words "is hereby charged with the duty of introducing," &c., as used in that section, amounts to anything more, when considered in connection with the other sections of the act, than the grant of the right or privilege of introducing water into the city and selling the same.

The legislature, however, by that act recognized the continued existence of the contract made with Mr. Stein and that the franchise granted to him could be resumed only by the City of Mobile complying with its part of such contract, and being willing that the appellee should take the place of the city under that contract, the 9th section to the Bienville Company's charter is added, which invests the appellee, "with all the rights and powers which by law or contract was vested in the late municipal corporation known as 'The Mayor, Aldermen and Common Council of the City of Mobile,' by *redemption, purchase or otherwise*, to acquire from any and all other persons, corporations, or associations whatever any and all *property and rights by* such person or persons, corporations, or association *held under any former contract or law whatever for the introduction and supply of water into the City of Mobile, or the inhabitants thereof, and for such purpose said Bienville Water Supply Company shall be held and taken to be the assignee of the said 'Mayor, Aldermen and Common Council of the City of Mobile,' and may proceed to assert said rights and exercise said powers thus assigned the same as could have been done by the municipal corporation aforesaid.*"

[Printed Record, page 26.

This section places the "Bienville Company" in the shoes of the City of Mobile as respects its contract with Mr. Stein. In accepting its charter from the State, the Bienville Company was charged with the knowledge that a previous grant of the right or privilege to supply water to the citizens of Mobile had been made and it took its grant subject to a proper *judicial construction of such previous grant*, and not a *legislative* construction thereof, written presumably by itself in its own charter. Having had itself made the assignee of the rights of the City of Mobile

[illegible] Water Supply Company [illegible]
[illegible] to acquire, by contract, gift, [illegible]
[illegible] company, or association, owning [illegible]
ply the [illegible] or City of Mobile or [illegible]
water, such RIGHT or RIGHTS as to it may [illegible]
premises and the PROPERTY OWNED AND [illegible]
REJECTION THEREWITH, and pay therefor such
money as may be agreed upon, or such amount as may be
upon in stock of the said Supply Company; and to [illegible]
by contract to obtain such right and property, then said [illegible]
hereby created may proceed, as directed by law for the [illegible]
and the taking of private property for public use, to obtain the same
for the purposes of the public use and benefit herein declared of fur-
nishing the Port of Mobile and the village of Whistler and the
inhabitants thereof with an adequate supply of water for domes-
tic, sanitary, and municipal purposes."

[Printed Record, page 36.

Under the sanction of this act of the legislature, the appellee has proceeded to build and operate its water works plant and supply water to the citizens of Mobile in derogation of the rights of appellant, notwithstanding the fact alleged in the bill and admitted by the demurrer, that "the said Albert Stein, as above and, out of his own private fortune and by borrowing money from others, raised the means to build, and did build and erect and construct, at an outlay and expense of more than two hundred thousand dollars, a system of public water works to supply said City of Mobile and the inhabitants thereof with water, in strict conformity to and compliance with the aforesaid contract and agreement; and orator's said testator and orator, as such executor, have ever since maintained and kept the same in good order and condition and in all respects observed the aforesaid contract and agreement; that the City of Mobile has not redeemed or purchased or offered to redeem or purchase said water works property, as by said contract it agreed to do, although said period of twenty years has long since expired."

[Printed Record, page 4.

It cannot be pretended that the appellant, or his testator, has not faithfully complied with the contract. The contrary is admitted.

The 11th section of the Birmingham Charter, after providing "That said corporation shall have and enjoy the exclusive right of conducting and bringing water from any point other than Three Mile Creek, in the county of Mobile, for the supply of said port and village of Whistler . . . and supply to the inhabitants of the port of Mobile and the houses and dwellings within the limits of said port . . . and if and when any existing claim to conduct water into Mobile from Three Mile Creek or any other point without the limits of said port has been obtained by this corporation, then said corporation shall have the exclusive right to supply said port and the inhabitants thereof with water."

This section is a direct infringement upon the franchise granted to Mr. Stein, and the only excuse offered for it is an attempted legislative construction of the Stein Franchise, or grant by limiting it to the right of taking water from the Three Mile Creek instead of the right of supplying water to the City of Mobile and the inhabitants thereof,—a construction which the legislature had not the power to make, and which is in direct antagonism with the construction placed by the judicial department of the State government upon the *act, contract or franchise.*

I respectfully submit that where the judicial department of the State government has construed an act of the legislative department, granting a franchise and the parties have acted under such judicial construction, *that such construction becomes part and parcel of the contract* which the parties thereto cannot be deprived of the benefit of by any subsequent act or decision, whether of the legislative or judicial department.

Insurance Co. vs. Deholt, 16 Howard, 416.
Havemyer vs. Iowa County, 3 Wallace, 294.
Olcott vs. Supervisors, &c., 16 Wallace, 678.
Chicago vs. Shelton, 9 Wallace, 50.

In delivering the opinion of the court (54 Ala., on pages 26 and 27), Mr. Justice Manning, in speaking of the effect and weight to be given to the previous decisions of that court on this very franchise granted to Mr. Stein, said: "Those cases, or at least the first of them, arose within a few years after the contract was made, and while yet the transactions and operations under it were new and the facts well known in the community. They were presented and argued at great length, by lawyers of distin-

[illegible] the documents and [illegible] founded and by which they were [illegible] these documents and [illegible] firmations in a case [illegible] court must then have been, and [illegible]

The previous repeated decisions of the [illegible] contract were accorded [illegible] *interions or affirmations*" in a case [illegible]

While the construction by the Supreme Court of Alabama [illegible] this contract may not be conclusive on this court, [illegible] along "*certainly* are not of [illegible] it proper that they should be disregarded [illegible] such a question is peculiarly within the province of the [illegible] the State to decide, and we ought not to depart from what [illegible] have done, except for imperative reasons."

Florida R. R. Co. vs. Schutze, 13 Otto, 113.

These decisions of the Supreme Court of Alabama construing the contract, or grant, are as respect that contract or grant, a *rule of property*.

Hardigree vs. Mitchum, 51 Ala., 151.
Bibb vs. Bibb, 79 Ala., 437.
Lyon vs. Richmond, 2 John's Ch., 51-60.

The grant to Mr. Stein being the grant of the exclusive franchise, privilege, or right to conduct water into the City of Mobile, and the exclusive right and privilege to vend the same to the inhabitants thereof, which franchise he could hold in perpetuity unless the City of Mobile redeemed the property and in connection therewith, was, and is *property* of which he cannot be deprived "but by due course of law."

"A legislative edict, which takes property from [illegible] gives it to another, is not due course of law."

[illegible] vs. Boykin, 38 Ala., 519.
[illegible] vs. Langham, 34 Ala., 359.

[illegible] submitted,

L. H. FAITH,
Attorney for [illegible]

W. Hall Phillips

Office Supreme Court U. S.
FILED.
APR 14 1891
JAMES. H. McKENNEY.
CLERK.

In the Supreme Court of the United States.

LOUIS STEIN, EXECUTOR OF ALBERT STEIN, DECEASED, APPELLANT,

vs.

THE BIENVILLE WATER SUPPLY COMPANY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

BRIEF OF T. A. HAMILTON,

Of Counsel for the Appellee.

In the Supreme Court of the United States.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

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STATEMENT OF THE PLAINTIFF'S BILL OF COMPLAINT.

The bill of complaint in this case was filed on the equity side of the Circuit Court of the United States for the Southern District of Alabama, by Louis Stein as Executor of the last will and testament of Albert Stein, deceased, on April 25, 1887, seeking, as the proprietor of what is known as the Stein Water Works in Mobile, Alabama, to enjoin and restrain the Bienville Water Supply Company of the City and County of Mobile from laying its pipes in or through the streets of Mobile, for the purpose of furnishing water through the same to the inhabitants of said City, and from conducting water through its said pipes into the City of Mobile for the purpose of furnishing and supplying the same to the inhabitants thereof, and also seeking to enjoin said defendant, the Bienville Water Supply Company,

from molesting or hindering the said complainant in what he claimed to be his full and exclusive right and privilege of supplying the City of Mobile and its inhabitants with water, until the corporate authorities of the City of Mobile shall have paid to said Complainant, as the executor of said Albert Stein, the value of the said Water Works. The plaintiff claims to rest his said alleged exclusive rights and privileges upon certain Acts of the Legislature of Alabama and written contracts, copies of which are attached to his bill as exhibits, or largely referred to in his bill.

It is also shown by the plaintiff's bill and exhibits that the defendant is a corporation of the State of Alabama, under an Act of incorporation approved February 19, 1883, and amended February 4, 1885. The preamble to the Act recites, among the reasons for its enactment, (see exhibit G to the bill, page 23 of the Record) that the inhabitants of Mobile are not provided with an adequate supply of water for domestic and municipal purposes, and that it is essential to the public health of the citizens of that place and to the protection of their property and of the public property therein against conflagration, that an abundant supply of water should be introduced and furnished to said citizens, and a company of citizens having proposed to undertake the duty of furnishing such a supply of water for the public use and benefit, the Act goes on (as set out on pages 24 to 29 of the printed Record) to incorporate the Bienville Water Supply Company charging it in Section 6 with the duty of introducing into the said City (then the Port) of Mobile such supply of pure water as the domestic, sanitary and municipal wants thereof may require. For this purpose power was given to it to acquire lands and use the public roads of the county and streets of the city to lay its pipes. It was also authorized to construct all needed canals and ditches, and by pipes and aqueducts to conduct water as may be needed into Mobile by such route as may be found best from any point in Mobile county, within twenty miles of the City of Mobile, and by Section 11 of said Act, (page 27 of the printed Record) it is provided that said defendant shall have and enjoy the exclusive right of conducting and bringing water *from*

any other point than Three Mile Creek in the County of Mobile for the supply of said Port, (now the City of Mobile) for the period of twenty years from the time when said water shall have been brought within the limits of said city and ready for distribution. The act of incorporation, as first enacted and afterwards amended, imposes on the defendant the duty of beginning the construction of its works and also of conducting said water into Mobile within a period of time which is limited in the said act of incorporation.

It is contended by the complainant that this act of incorporation is an infringement upon the exclusive right which is claimed by him to supply the city and citizens of Mobile with water from all sources, and that any attempt by the defendant to introduce water into said city from any source whatever, as it is alleged it is now doing, is an infringement upon his rights, which should be enjoined and prohibited.

The prayer of the bill among other things is that the defendent may be restrained from molesting or hindering the complainant in the full and exclusive right and privilege of supplying the City of Mobile and the inhabitants thereof with water, etc.

STATEMENT OF DEMURRER TO BILL.

The defendant filed a demurrer to the bill upon a number of points, general and special, among which the following may be particularly stated, viz:

First. According to the allegations of the bill of complaint the complainant cannot rightfully claim any exclusive right to furnish water to the city or citizens of Mobile, excepting from the Three Mile Creek, and it is not alleged that the defendant has at any time proposed, or does propose to interfere with any such right.

Second. It appears from the allegations of the bill that the Complainant cannot rightfully claim any exclusive right to furnish water to the City of Mobile or its inhabitants *excepting from the Water Works of said Complainant*, and it is not alleged that the defendant has at any time proposed, or is now proposing, to interfere with any such right.

from molesting or hindering the said complainant in what he claimed to be his full and exclusive right and privilege of supplying the City of Mobile and its inhabitants with water, until the corporate authorities of the City of Mobile shall have paid to said Complainant, as the executor of said Albert Stein, the value of the said Water Works. The plaintiff claims to rest his said alleged exclusive rights and privileges upon certain Acts of the Legislature of Alabama and written contracts, copies of which are attached to his bill as exhibits, or largely referred to in his bill.

It is also shown by the plaintiff's bill and exhibits that the defendant is a corporation of the State of Alabama, under an Act of incorporation approved February 19, 1883, and amended February 4, 1885. The preamble to the Act recites, among the reasons for its enactment, (see exhibit G to the bill, page 23 of the Record) that the inhabitants of Mobile are not provided with an adequate supply of water for domestic and municipal purposes, and that it is essential to the public health of the citizens of that place and to the protection of their property and of the public property therein against conflagration, that an abundant supply of water should be introduced and furnished to said citizens, and a company of citizens having proposed to undertake the duty of furnishing such a supply of water for the public use and benefit, the Act goes on (as set out on pages 24 to 29 of the printed Record) to incorporate the Bienville Water Supply Company charging it in Section 6 with the duty of introducing into the said City (then the Port) of Mobile such supply of pure water as the domestic, sanitary and municipal wants thereof may require. For this purpose power was given to it to acquire lands and use the public roads of the county and streets of the city to lay its pipes. It was also authorized to construct all needed canals and ditches, and by pipes and aqueducts to conduct water as may be needed into Mobile by such route as may be found best from any point in Mobile county, within twenty miles of the City of Mobile, and by Section 11 of said Act, (page 27 of the printed Record) it is provided that said defendant shall have and enjoy the exclusive right of conducting and bringing water *from*

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The prayer of the bill among other things is that the defendant may be restrained from molesting or hindering the complainant in the full and exclusive right and privilege of supplying the City of Mobile and the inhabitants thereof with water, etc.

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First. According to the allegations of the bill of complaint the complainant cannot rightfully claim any exclusive right to furnish water to the city or citizens of Mobile, excepting from the Three Mile Creek, and it is not alleged that the defendant has at any time proposed, or does propose to interfere with any such right.

Second. It appears from the allegations of the bill that the Complainant cannot rightfully claim any exclusive right to furnish water to the City of Mobile or its inhabitants *excepting from the Water Works of said Complainant*, and it is not alleged that the defendant has at any time proposed, or is now proposing, to interfere with any such right.

Third. It appears from the allegations of the bill that the claim of the complainant to supply water to the City of Mobile and its inhabitants at certain specified prices to be paid to complainant has long since expired, and the only right the complainant had when the bill was filed, or since, was to furnish water to the City of Mobile or its inhabitants free of charge, and it also appears that the defendant is not interfering, or proposing to interfere, with any right of complainant of which he has any right to complain in this suit.

Fourth. It appears from the allegations of the bill that the acts of the Legislature granting the privilege under which plaintiff claims were granted for the benefit and advantage of the health of the City of Mobile, and no exclusive grant was thereby given by the law making power to interfere with, prevent or obstruct other legislation to promote the health of citizens, and the power of the Legislature to change, by subsequent legislation, its laws in regard to health was not taken away or destroyed by the earlier legislation.

Fifth. It appears that in the enactment of the charter of the defendant the General Assembly of Alabama did not go beyond its legitimate power in legislating for the protection of the health of its citizens, but acted within the scope of its lawful powers.

Sixth. The allegations of the bill are not sufficient to authorize the Court to interfere with the defendant in furnishing water to the city and citizens of Mobile from any other source than Three Mile Creek.

ARGUMENT.

If we look at the principles of law applicable to such a case in connection with the facts as set forth by the complainant himself I respectfully insist that the complainant comes far short of presenting a case which entitles him to the interposition of a court of equity.

The only way in which said plaintiff or Albert Stein, under whom he claims could have obtained the exclusive rights which are claimed by him would have been by a grant of *them from the sovereign power, the Legislature of the State of Alabama.*

Neither the City of Mobile nor any other power than the Legislature of the State or some body to whom the State had given the power had any authority to grant them, and there is no allegation that the State had made any such transfer of its power or authority. See Birmingham and Pratt Mines Street Railway Company vs. Birmingham Street Railway Company.

79 A. R. 466-475, 111 U. S. R. 763, 115 U. S. R. 659 and 681, 10 Atl. R. 170 and 174, note 54 A. R. 28, 28 Fed. Rep., 534.

If it were attempted to set up the claim of the plaintiff under any recent act of the Legislature of Alabame, it would be held unconstitutional and void under the constitution of the State adopted in 1875 which prohibited the making of any irrevocable grants of special privileges or immunities.

See 79 A. R. 466 (head note 4) Ala. State Constitution of 1875, Art. 1, Sec. 23.

It is true that when the acts of the Legislature were passed under which the plaintiff claims to proceed, the State Constitution of 1819 was in force, under which the provision was that "no man or set of men are entitled to exclusive separate public emoluments or privileges, *but in consideration of public services.*"

Ala. Constitution of 1819, Art 1, Sec. 1.

Under this the Legislature could grant exclusive privileges in proper cases in consideration of public services, and I suppose they could determine the extent of public service, to be rendered as the "*consideration*" for the privileges granted. In the case now presented, I apprehend the public service Mr. Stein undertook to render, was but a very small consideration upon which to found his claim for such extensive privileges as are claimed by him. (See his contract pp. 16-20 of printed Record).

It would really seem, according to the views of the Court of Appeals of Kentucky, that no such public services were to be furnished by Mr. Stein as were necessary under the constitution to entitle him to the exclusive privileges which are claimed. See 14 S. W. R. 372.

In some cases a question might be raised whether a mu-

nicipal corporation might not have been invested with power and authority by grant from the Legislature during the existence of the Alabama State Constitution of 1819, to bestow exclusive rights and privileges such as are here claimed: but no such question arises in this case for it is not claimed and cannot be pretended that any power was conferred by the Legislature of the State of Alabama upon the City of Mobile to bestow upon Mr. Stein or any other party any such exclusive privileges as are here contended for.

Let us then consider first the

GENERAL PRINCIPLES APPLICABLE TO SUCH CASES.

The plaintiff insists that he was given a right to supply the City and citizens of Mobile with water, and that this right in him was such as to exclude any and everybody else from furnishing water to that city or its citizens. The defendant, on the other hand, contends that, at all events, the utmost extent to which Mr. Stein could claim any exclusive right in supplying the people of Mobile with water was that he alone had the right to furnish them with water *from the Three Mile Creek*.

The general principles applicable to such claims are well settled. Thus, in considering these claims to grants of exclusive rights and privileges, it is clear, under all the authorities, that the grants of such privileges "*are never to be extended by construction beyond the plain terms in which they are conferred.*"

Cool. Const. Lim., 495, top paging (4th Ed.)

(394, star paging).

"The just presumption in every such case is that the State has granted in *express terms* all that it designed to grant at all."

Cool. Const. Lim., 495, t. p. (394-5, star paging).

"In the construction of a charter, to doubt is to be resolved, and every resolution which springs from doubt is against the corporation."

Cool. Const. Lim., 495 t. p. (395 star paging).

"This rule is not confined to the grant of a corporate franchise, but it extends to the grant of all franchises or privileges by the State to individuals, in the benefits of which the people at large cannot participate."

Cool. Const. Lim., 497 t. p. (396 star paging).

"The grant of ferry rights, or rights to erect a toll bridge and the like is not only to be construed strictly against the grantees but it will not be held *to exclude the grant of a similar and conflicting privilege to others unless the terms of the grant render such construction imperative.*"

Cool. Const. Lim., 497 t. p., (396 star paging) 11 Peters 544; see also 3 Wall, 75.

In 97 U. S. R. 666 the court says: In this class of cases "nothing is to be taken as conceded but what is given in *unmistakable terms* or by an implication equally clear. The *affirmative must be shown—silence is negation and doubt is fatal to the claim. This doctrine is vital to the public welfare.* It is axiomatic in the jurisprudence of this court."

97 U. S. R. 666. See also 101 U. S. R., 540.

These are rules applicable to all claims of grants or franchises belonging to the public, but it is even more stringently so in cases where it is claimed that *monopolies* are given.

Thus in a recent case decided by Judge Brewer in 1887 in the United States Circuit Court for the District of Nebraska, the first head note is, "In 1867 plaintiff company, by its charter, was given the exclusive horse railway franchise of Omaha for 50 years. defendant company under a city ordinance consented to by the people in 1884 authorizing it so to do, undertook to lay cable tramway in Omaha on streets occupied by plaintiff who sought to enjoin defendant, contending that at the date of its grant horse railway meant "street railway," (cable roads being then unknown), and therefore its grant covered that form of railway communication. The court denied the injunction. Held no error, since all grants of franchises belonging to the public being strictly construed against the grantees, *a fortiori those giving monopolies should be so construed* and courts could not enlarge them by implication."

30 Fed. Rep., 324.

In the body of the opinion in this case the court quotes from C. J. Taney, in 9 How., 192 as follows: "The rule of construction in cases of this description is this, *that any ambiguity in the terms of the grant must operate against the corporation*

and in favor of the public, and the corporation can claim nothing that is not clearly given by the law," &c., &c.

30 Fed. Rep., 327-8.

And again, Judge Brewer says: "*This rule of construction against the grantee which applies in all legislative grants obtains with the greater force in a case like the one at bar where the right claimed is not merely the right to do something, but of a right to exclude all the rest of the public from doing that thing. He who says that the State has given him a franchise, a right to do that which without that franchise he could not do, will be compelled to show that the franchise, the right claimed, is within the terms of his grant. Much more strenuous must be the demand upon him for clear and explicit language in his grant when he claims that a part of it is not merely the franchise, the right to do, but also to exclude all others of the public from exercising the same right, and the State as the representative of the public from according the same right to another.*"

30 Fed. Rep., 328.

It seems to me the same language would apply in such a case as was used by the Supreme Court in one case in reference to the retaining by the sovereign of the power of taxation, viz: *That the whole community is interested in its being retained by the sovereign without diminution* " *and has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.*"

The court then added that "the surrender, when claimed must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power. If a doubt arise as to the intent of the Legislature, that doubt must be solved in favor of the State."

18 Wall R., 226. See also 11 Peters R., 549-550, 4 Peters R., 561.

The rule is thus expressed by Black C. J. of Pennsylvania: "No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the Legislature in a manner too plain to be misunderstood."

21 Pa. State R., 22. See also 26 Pa. State R., 355, 27 Pa. State R., 351.

APPLICATION OF THESE PRINCIPLES.

If then we apply the principles which are thus shown to be properly applicable to the circumstances of this case as they are furnished by the complainant in his bill and the exhibits thereto, I think it will be found that they utterly fail to show any such exclusive rights as are claimed by the complainant.

The allegations of the bill are perhaps not made as clearly and distinctly as possibly they might have been. It may be necessary, in order fully to comprehend the complainant's case as presented in the bill and exhibits, that careful and constant attention should be paid to those exhibits. He founds his claim upon those exhibits and makes them a part of his bill of complaint, and I apprehend an examination of them in conncetion with his bill falls very far short of showing what I apprehend the rule in such cases requires, viz, a clear and unmistakable intention on the part of the Legislature to grant to Albert Stein, his executors, etc., the sole and exclusive right to supply the City of Mobile and the inhabitants thereof with water to the exclusion of all other parties from the year 1840 or thereabouts, until the City of Mobile should have paid to them the actual cost of his works, etc.

Mr. Stein, in urging his claim, lays great stress upon *an act of the Legislature of the state of Alabama approved December 20, 1820,* to be found as Exhibit A. in the printed record on pages 7 to 10 inclusive, and contends that under it the authority was given to the grantee in it to obtain water not only from the Three Mile Creek, but from anywhere else in Mobile County, and that it also gave to the grantee under it *the exclusive privilege* for forty years from 1820, of furnishing water to the City of Mobile and its inhabitants, and that this exclusive right is still outstanding and is now vested in the complainant. If, however, we look at this ACT OF 1820 in all its parts I think it will be found that it can bear no such construction as is contended for by the complainant and if it ever could have done so any such right has long since expired and cannot be claimed by complainant as outstanding and held by him. (See the Statutes as found in the printed record, ps. 7-10)

The preamble to the act and which may be looked upon as "a key to it, to open the minds of the makers as to the objects which are to be accomplished by its provisions," is as follows, as recited in Exhibit A. to the bill of complaint, viz: "Whereas it has been represented that it would be of singular advantage to the health and convenience of the City of Mobile to be supplied with water from some of the running streams in its vicinity which would be attended with too much labor and expense to be affected by levying a tax for the purpose and whereas it has also been represented that certain individuals have agreed to associate themselves together for the purpose, of conducting a supply of water *from a creek called Three Mile Creek, otherwise Bayou Chatogue* for the use of the citizens and other persons residing in the City of Mobile. *Therefore be it enacted*, etc." Printed Record, ps. 7-8.

The act nowhere speaks of water as being furnished under it from any other source than the said Three Mile Creek and even its third section upon which the complainant seems to lay great stress as giving the exclusive privilege contended for reads as follows, viz: "That the said corporation and their successors shall have and enjoy the exclusive right and privilege of conducting and bringing water for the supply of said City for the space of forty years, *provided the said Corporation or their successors shall before the expiration of three years from this act, cause to be conducted the water from the said bayou or creek to the said City of Mobile* in the manner hereinbefore proposed, and provided also that after the expiration of the said term of years the said water works shall become the property of the said City for the use* of the inhabitants thereof forever." (Exhibit A to bill Printed Record page 9).

Section five of this Act of December 20, 1820, also provides in so many words that "*No person shall be compelled to pay*" *the sums authorized by the Act to be charged for the use of the water who does not use it directly or indirectly.* (See Exhibit A. to bill Printed Record p. 10,) page 34 of the MSS.

*NOTE. I may here observe that this language, viz:, that after 40 years the works should become the property of the City of Mobile for the use of the inhabitants forever, is really in the Act of the Legislature "for the *free* use of the inhabitants," etc., but I suppose the meaning is intended to be the same.

Assuredly these provisions of the Act of December 20, 1820, do not accord well with the complainant's idea that this Act was intended to give *in clear and unmistakable language a clear right* to a grantee under it to carry and convey water into the City of Mobile from anywhere and everywhere *for an indefinite period of time*, and to exclude all other persons from conducting water into the said City for the use of its inhabitants.

So far as this Act of 1820 is concerned it must be observed that it did not purport to come any further down than until the year 1860 while this bill was not filed until 1887, and moreover its operation was dependent upon a proviso that the water supply of the City should have been perfected before December 20, 1823, which condition is not pretended to have been at all complied with, but on the contrary it seems to be admitted (by implication at least) that it was not. (See Printed Record, page 2, MSS. ps, 4-5).

The bill of complaint then attempts to support the position of the complainant by a recital of various Acts of the Legislature and agreements made between the city and other parties looking to the establishment of satisfactory water works for the City of Mobile, from the date of said Act of December 20, 1820, until the execution of articles of agreement between Albert Stein and the city of Mobile of December 26, 1840, and the approval of the same by the Legislature in January, 1841, the principal importance of which is perhaps to be found in the fact that they give somewhat of a history, though perhaps not a very complete or perfect one, of these transactions.

Thus it is stated that *in December, 1824*, the aqueduct company intended to be created by said of Act of December, 1820, having failed to build the proposed Water Works, the Legislature by an amendment of the Charter of the City of Mobile declared said Act of December, 1820, null and void, and that all the rights and privileges, etc., granted by it to said Aqueduct Company were thereby transferred to and vested in said City of Mobile for the use and benefit of its inhabitants. (Printed Record pp. 1-2, MSS pp. 3-4).

The bill then alleges that the City of Mobile made but very

little progress, *between December, 1824, and December 1, 1836*, towards building said Water Works, and then entered into an *agreement of December 1, 1836*, with H. Hitchcock, which is attached to the bill as Exhibit B. (Printed Record p. 2, MSS pp. 4-5).

By this exhibit, however, it appears that they had gone on and built the water works at that time known as the "Mobile City Water Works, embracing the grounds at Spring Hill where the fountain was situated," etc., and which water works and fountain at Spring Hill, as a matter of public history, as well as inference from the statements made in the bill and exhibit, were the outgrowth of the previous propositions and had their connection *with the Three Mile Creek*, from the waters of which stream said waters were conducted. And so in the latter part of this agreement of *December 1, 1836* (Printed Record p. 13, near bottom of page), provision was made to authorize Judge Hitchcock and his assigns, if they desired to do so, *to change the source of supply of their water works, to any part of the Three Mile Creek*, thus evidently looking upon the Three Mile Creek as their only source of supply. (For this agreement of December 1, 1836, see Record, pp. 11-14.)

The bill of complaint, in continuing the history of this matter, attaches as exhibit C (printed record p. 2, MSS. p. 6) the copy of another Act of the Legislature of Alabama, entitled an Act to Incorporate the Mobile Aqueduct Company, *approved December 25, 1837*, which contemplated the establishment of a new Aqueduct Company, with a capital of $150,000, with power and authority to purchase out the interests of said H. Hitchcock under the agreement of December 1, 1836, and thereafter to take his place; but this new Aqueduct Company *was only to come into life or have any existence* after $100,000 should have been subscribed to its capital stock, and thereafter an election should have been held for a President and four Directors, while it nowhere appears, or is alleged, that the required $100,000 was subscribed or any election held or any purchase of the right of Hitchcock made; so that it would follow that this charter of December 25, 1837, never had any validity or effect. (See exhibit C Printed Record

pp. 14 to 16.) The bill then alleges as a further part of the history of this matter that said Hitchcock died shortly after obtaining said charter of December 25, 1837, and that said Water Works property again passed into the possession of the City of Mobile about the year 1839. (Printed Record p. 2, MSS. p. 7.)

Thus we have the history of these transactions according to the plaintiff's own statement of them brought down to the year 1839, and now we come to the plaintiff's statement of the connection of Albert Stein with them, under which he claims that all his rights originated.

The contention of the plaintiff is that on the 26th day of December, A. D. 1840, a written contract was made between the corporate authorities of the City of Mobile on the one side and Albert Stein on the other side, and afterwards ratified and confirmed by the Legislature of the State of Alabama by Act of January 7, 1841, whereby there was conveyed to said Albert Stein, his executors, etc., the exclusive right to supply the City of Mobile and its inhabitants with water at certain maximum prices, fixed by that agreement from the day of its date and its ratification by the Legislature of Alabama in January, 1841, and to continue until the city of Mobile should have repaid to him or his executors, etc., the cost of his Water Works, and that any attempt by the defendant, or anybody else, to introduce water into said city from any source whatever for the supply of its citizens, is an infringement of the rights of the plaintiff, as the executor of said Albert Stein's will, which should be perpetually enjoined, etc. (See printed Record pp. 2-7).

It would seem then, from the complainant's bill of complaint, that he rests his claim to his said alleged exclusive rights upon this contract between the corporation of the City of Mobile and Albert Stein, or his alleged testator, bearing date December 26, 1840, and the ratification of the same by the Legislature of Alabama by the Act of January 7, 1841, (See printed Record pp. 2-4, MSS. pp. 7-15).

NOTE. In this exhibit D the Plaintiff has inserted the agreement of December 26, 1840, in the exhibit as if it formed a part of the Act of the Legislature of January 7, 1841, and was embodied in it, when no such thing in fact occured; but I do not see that this is of any consequence to the result.

In order to show exactly what those are, he says he attaches copies of them as an exhibit D to his bill of complaint (See printed Record p. 4, MSS. p. 13, and for exhibit D printed pages 16-20).

In coming then to consider this *agreement of December 26, 1840*, and the Act of the Legislature in ratification of it, perhaps it may not be amiss to call attention for a moment to the general rule that, "Courts in construing contracts, look to the language, the subject matter and the circumstances, and avail themselves of the light the parties had when the contract was made in order that they may view the circumstances as the parties viewed them, and so judge of the meaning of words and their application to things described."

1 Kinney's U. S. Dig. 466, Sec. 1; 5 Wall. 689-699, 111 U. S. R. 584.

So also we must remember that when a claim is made that one has been granted an exclusive privilege, such as is here insisted on by the plaintiff in order to substantiate his claim, he must show such a grant in plain and unmistakable terms to him, and in such language that it must have been plainly intended to exclude the right which is claimed by other parties (See authors before cited).

Viz: Say Cooley's Const. Lim. 4th Ed. 495-497 top paging, (394-396 star paging); 11 Peters 544, 549, 550; 3 Wall. 75; 97 U. S. R bbl; 101 U. S. 540; 30 Fed. R. 324, 327, 328; 18 Wall. R. 226; 4 Peters R. 561; 21 Pa. State R. 22.

We have seen in the history of this matter and from the statements of complainant that efforts had been made previous to 1850 to establish satisfactory Water Works for the conducting of water *from the Three Mile Creek* (and I may add from nowhere else) into the City of Mobile, for the use of the inhabitants, which the bill says had fallen through in or about the year 1839. (Printed R. p. 2, MSS. p. 7).

According to the allegations of the bill a contract was made between the City of Mobile and Henry Hitchcock in 1836 (see Exhibit B. p. 11, of the Printed Record, MSS. pp. 38-39) by which the City was to lease to said Henry Hitchcock, the then

"Mobile City Water Works," so called, embracing the grounds at Spring Hill where the fountain was situated (see Printed Record, p. 11, MSS. pp. 38-39) and which it would appear from all the circumstances must have been constructed under the authority of the previous Acts of the Legislature and had the Three Mile Creek as its source of supply, but about the year 1839, according to the allegations of the bill, (see Printed Record, p. 2, MSS. p. 7) the building of the proposed water works under previous arrangements having fallen through and the said water works property, that is to say, the City Water Works grounds at Spring Hill, with its connections with the Three Mile Creek, and the pipes and logs laid down having passed into the possession of the said City, and said City being exceedingly anxious for a satisfactory system of water works, it is alleged that it entered into the contract of December 26, 1840, with one Albert Stein the testator of the complainant bearing date on that day and which is set out at length in Exhibit D. to the bill of Complaint and to be found on pages 16 to 20 inclusive of the printed record. (For the allegations about the making of this contract see pp. 2-4 of Printed Record).

What had passed before in regard to building water works may be perhaps considered as preliminary to this agreement and to it and the act of the Legislature of January 7, 1841, also to be found on pages 16 to 20 inclusive of the printed Record, it would seem as already stated, we must look to see the nature and extent of the rights which can be had or claimed by the complainant in this case.

An examination of these articles of agreement and of the act of ratification shows upon their face that what was in the mind of the parties and the Legislature was simply the granting of the sole privilege of supplying the City of Mobile with water *from the Three Mile Creek for twenty years from the date of that agreement*, although as *incidental* thereto said Stein and his executors, etc., were also to have such benefits and advantages in connection therewith and not inconsistent with the terms of the agreement and Act of the Legislature as might accrue to the corporation of Mobile under and by virtue of the said act of December 20, 1820, and of the act amending the char-

ter of said City of December 24, 1824. and of said Act of December 25, 1837, incorporating the Mobile Aqueduct Company, all of which have been before alluded to. (See copy of this agreement and Act, pp. 16-20 of Printed Record.)

This agreement also shows that the previous water works hereinbefore alluded to were then in existence and were only to be discontinued when new works should have been erected. (See Printed Record, p. 19, MSS. p. 67)

It also shows an express agreement,(ratified by the Legislature in the ratifying Act) that as we have seen before was allowed also in the agreement with Hitchcock of December 1, 1836 "to change the fountain head and conduct the water *from any part of Three Mile Creek*" (see Record, p. 13, near bottom, MSS. p. 48) so, also, said Stein or his executors, etc., should have "*the power and authority to conduct the water from any part of the Three Mile Creek" but with not one word of illusion in either case to any authority in them to get it from any other source than Three Mile Creek.* (See Printed Record, page 18, MSS. p. 64.)

We have seen that the books are full of decisions to the effect that in such a case as this in order for the plaintiff to make out his case he must be able to show in language too plain to be mistaken, a clear and unequivocal grant to him of all the privileges which he claims. In the case before the Court we respectfully insist the plaintiff comes no where near to making such a showing as was necessary for his purposes. It would have been strange indeed if the Legislature could have intended to give to its grantees the exclusive right to conduct water to the city from any and all sources, that they should never have said so, but on the contrary that they should *constantly and on all occasions allude to the Three Mile Creek as his source of supply.* I do not know that we are called upon to furnish any reasons why the Three Mile Creek should in those days have been so constantly in the minds of the parties who were then figuring in connection with this water supply. It is very evident that the fact was so. There were, however, as said by Judge Toulmin when delivering his opinion in the Court below, several considerations which might well have influenced the

parties in 1840 or 1841 in restricting the grant to the sole privilege of bringing the water from the Three Mile Creek, such as the location and accessibility of that stream, the quantity and quality of the water afforded by it and the fact that the city was the owner of the City Water Works, embracing ground at Spring Hill where the fountain was situated and whence the City had been endeavoring for years to get its supply of water. Owing to the superior advantages of the Three Mile Creek as a source of water supply for the City of Mobile, the parties might reasonably have supposed that no attempt would be made to bring water from any other creek or stream to supply said city at least for a period of twenty years.

However that may, be I respectfully insist that under the rules of law applicable to such cases it cannot be contended with any show of reason that the provisions of this agreement of December 26, 1840, are at all sufficient to show any right upon the part of the complainant to interfere by injunction or otherwise, with the defendant in its attempt, under its charter from the state of Alabama, to introduce a supply of pure and wholesome water from a source entirely distinct from and independent of the Three Mile Creek, and when it is not alleged or pretended that the defendant is attempting or proposing to draw any water whatever from said Three Mile Creek.

Upon looking still further at the terms of this agreement of *December 26, 1840*, I find the portion of it which seems to give most countenance to the claims of the Complainant is to be found on pages 17-18 of the printed and pages 61-62 of the manuscript record, and which reads as follows, viz: "And the said Mayor, Aldermen and Common Council, of the City of Mobile for themselves and their successors in office, hereby covenant and agree, (he the said Albert Stein, his executors, administrators and assigns, well and truly complying with all and singular, the within stipulations and agreements on his part to be done, performed and complied with) that he and his executors, administrators and assigns shall, and may retain quiet possession *of the said Water Works* for the term of twenty years without let, molestation or hindrance of the said Mayor, Aldermen and Common Council or their successors in office or

any person claiming by, through or under them, and that the said Albert Stein, his executors, administrators and assigns, shall, during the said term of twenty years, or any further time until said works are redeemed as above stipulated, have the exclusive privilege of supplying to the citizens and inhabitants of the City of Mobile, water *from the Water Works aforesaid*, at the sum or price which shall at no time exceed the following rates," &c:

(Printed Record pp. 17-18 and Manuscript Record pp. 61-62).

Among the agreements on the part of the said Albert Stein, which he was thus to perform and comply with was one that he was required to introduce the water into the city under his contract within two years from its date. (See Printed Record, p. 19 Manuscript p. 68), and the contract also shows that it was the water from Three Mile Creek that he was to introduce. (See Printed Record, p. 16 Manuscript page 57).

If then we apply again the rule which is applicable to this class of cases, viz: That only so much is to be held to be embraced in these grants of privileges as is *clearly and unmistakably granted in clear and unequivocal terms*, it follows even under this part of this contract, whatever might be supposed to be the case before, that *after the expiration of twenty years from the date of that agreement*, that is to say, after December 26, 1860, the exclusive right of Mr. Stein and his executors was confined strictly and entirely to his right to the possession of *the Water Works* which he had builded, and the sale and delivery of water *from those Water Works* until the City of Mobile should purchase out those works.

It follows that after December 26, 1860, he would have no manner of right to prevent any body else from carrying water into the City of Mobile, *even from Three Mile Creek, provided he was not disturbed in the control and management of the works which he had builded.* He certainly would have no manner of right to attempt to interfere with the Defendant in this case in bringing water into the City of Mobile from an entirely different source than the Three Mile Creek and by a new system

of Water Works entirely distinct from, and independent of the Stein system.

It may be contended however, that that portion of this agreement which is to be found on pages 16 and 17 of the printed, and pages 57 and 58 of the Manuscript Record, furnishes more material in support of the complainant's case, but to this also I cannot agree. That part of the agreement is in the following language, viz: "The said Mayor, Aldermen and Common Council, of the City of Mobile for and in consideration of the covenants and agreements hereinafter contained, mentioned and reserved, on the part of the said Albert Stein, his executors, administrators and assigns to be paid, kept, done and performed, have granted and by these presents do grant unto the said Albert Stein, his heirs, executors, administrators or assigns, *the sole privilege of supplying the City of Mobile with water from the Three Mile Creek for twenty years from the date of this agreement, as well as all the benefits and advantages which accrue to the said Mayor, Aldermen and Common Council, from, by or under an act of the Legislature of the State of Alabama, entitled an act to incorporate an aqueduct company in the* City of Mobile, passed December 20, 1820, and all ordinances and resolutions passed by the said Mayor and Aldermen of the City of Mobile, under and by virtue of the said act or by the act of incorporation of the said City of Mobile, and the several acts amendatory thereto, which in any way or manner relate to the said City Water Works or the right to supply said city with water—*as well as all the benefits and advantages which accrue to the said Mayor, Aldermen and Common Council, or the Mayor and Aldermen of the City of Mobile, from, by or under an act of the Legislature of the State of Alabama, entitled an act* to incorporate the Mobile Aqueduct Company passed December 25, 1837, to have and to hold the above mentioned and described privileges, together with all and singular the appurtenances unto the same belonging, or in any way appertaining unto the said Albert Stein, his executors, administrators and assigns *from the date hereof, for, during and until the full end and term of twenty years thence next ensuing.*"

It seems to me to be apparent from this language of the

agreement *that the thing of importance in the minds of the parties*, as I have already stated, *was the privilege of supplying water from the Three Mile Creek and when they added "as well as all the benefits and advantages which accrue"* from the act of 1820, and "*all ordinances and resolutions* passed by the Mayor," &c., "as well as all the benefits and advantages which accrue to the said Mayor, &c. from the act of December 25, 1837," *this was int nde l only as an incident to the privilege of conducting the water from the said Three Mile Creek, and nothing more.*

The question of the exclusive nature of Mr. Stein's rights was once submitted to the late Hon. A. R. Manning, one of the best of the Alabama lawyers, and who occupied at the time of his death a position upon the Supreme Bench, for his opinion, and I trust I may be permitted to quote from the language of that opinion upon this part of the case as a part of my argument.

"Is it not plain" said Mr. Manning, "that having described and defined *the subject of the grant* as "the sole privilege of supplying the City of Mobile with water from the Three Mile Creek for twenty years, they intended to add by the words referred, to only things "which accrue" as *accessaries and incidents* thereof—*those means* for the secure enjoyment of the franchise granted which had been provided by the acts and ordinances referred to in respect to the franchises to which they related—such as the right of way for the water pipes through the lands of individuals—the use of the streets of Mobile for the same purpose free of charge—penalties against persons who should in any of the various ways mentioned, obstruct or interfere with the right granted and other like provisions? If this be not the proper construction—if words appropriate to matters auxiliary to the main subject of the grant and inapt and unusual when applied to it are made to operate so as to change entirely the precise definition of the main subject and to render of no effect words prescribing a *limitation* which seems never in their subsequent references to the subject, out of the minds of the parties—well established rules of interpretation are disregarded; and the charter in this case would *be construed*

strictly against the public and liberally in favor of Mr. Stein, nay, latitudinously in his favor."

By such a mode of interpretation, Stein might also claim the right to charge higher water rates than those set down in his agreement with the city. For, according to this agreement, his charge shall be, "For retail grocery stores where liquor is "not retailed, twelve dollars per annum," while by the act of 1837, confirming the contract with Hitchcock, the charge authorized is, "For retail grocery stores, fifty dollars per annum, each." So, by the agreement with Stein, the charge prescribed is: "For liquor stores doing the business of drawing off and bottling wine and other liquors, from thirty to seventy-five dollars;" while by the contract with Hitchcock validated by the act of 1837, the charge allowed for these liquor stores described in the same words, is one hundred dollars: and so on. Therefore, if Stein is entitled to "all the advantages and benefits which accrue" from the act of 1837, as he may construe that language,—why is he not entitled to charge these higher rates authorized by it? And if he is,—of what use was it to prescribe the water rates in the agreement with him,—any more than to designate a particular water course as that from which he would have "the sole right of supplying the City of Mobile with water." Of course, such an interpretation is wholly inadmissible. Such rights are "inconsistent with the terms of the agreement," and therefore, were not granted by the act confirming it."

Not only this, but turning again for a moment to this part of the agreement of December 26, 1840, (Manuscript page 58), it will be seen that this grant of privilege was only to be *for twenty years* from that date, and therefore came to an end in the year 1860, so that it gives no authority for claiming anything under it after that time.

If then we look a little more closely at the provisions of the Act of December 20, 1820, in connection with the subsequent Acts of 1824 and 1837 as referred to by the plaintiff, and in the said agreement of December 26, 1840, (to be found on said pages 57 and 58 of the MSS. Record,) I think we cannot fail to be still more firmly convinced that the complainant can

not derive any benefit from any of these Acts of the Legislature, (viz: these Acts of 1820, 1824 and 1837) toward establishing any claim on his part to an exclusive right to supply the inhabitants of Mobile with water from any other source than the Three Mile Creek. In this connection it may be observed that the only part of the act of December 20, 1820, which seems to give any countenance whatever to any such claim on the part of the plaintiff, is the third section of this Act, and this couples it with the proviso that *it is to be inoperative unless the said Aqueduct Company should before December 20, 1823, conduct the water from the Three Mile Creek to the City of Mobile.* (See the Act in printed R. p. 9, MSS. p. 31).

Then comes the Act of December 24, 1824, in which it is provided, as the complainant himself states, that the Aqueduct Company having failed to comply with the requirements of the Act, the said act of December, 1820, was declared to be null and void, but with the accompanying statement that "all the rights, privileges and immunities, powers, prerogatives and authority *which appertained to the said Aqueduct Company by virtue of the said Act of 1820,* were thereby transferred to and vested in the corporation of the City of Mobile (See pp. 1 and 2 printed R. MSS. pp. 3 and 4).

There is no pretense of any claim that the said Aqueduct Company had complied with the condition precedent, that it should, within the time required, have caused the water to be conducted from the said Three Mile Creek into the City of Mobile, and, therefore, it clearly follows that no exclusive right could have then *appertained* to the said Aqueduct Company *by virtue of said Act of December 20, 1820,* to carry water into the City of Mobile, under section 3 of the Act of 1820, and of course no such right existing in said Aqueduct Company it could not have passed to the City of Mobile under the Act of December 24, 1824, and not having passed to the City of Mobile it is equally clear it could not have passed from the said City to Mr. Stein, or his successors, under the agreement of December 26, 1840, or the Act of the Legislature which ratified that agreement.

It may be said that the plaintiff's claim to an exclusive

right to supply the citizens of Mobile with water, to the exclusion of all other sources of supply, as derived from the third section of said Act of *December 20, 1820*, is strengthened and supported by the Act of the Legislature of December 25, 1837, and, therefore, I beg to invite attention to the terms and provisions of that Act It is to be found on pages 14 to 16 of the printed Record, MSS. pages 50 to 55. By reference to it, it will be seen that the *act of 1837* made provision for the organization of a new aqueduct company upon the happening of certain events which are not alleged to have occured, and which, in point of fact, never did occur.

The first and second sections of this Act provided for the opening of books of subscription to $150,000 of capital stock and for an election of officers when $100,000 should have been subscribed. Section 4 provided *that from and after the first election* (which is not shown or alleged to have ever taken place) the corporate existence of said company should commence and that then it would continue until December 1st, 1856, and that during the period of this corporate existence the said proposed new company should have and enjoy all the rights, privileges and immunities which were contained in the said act of December 20, 1820, and which act except as modified by said Act of December 25, 1837, was declared to be thereby revived and to be in force during the continuance of this Act of December 25, 1837. I apprehend that this act never went into effect. No such corporation as it contemplated ever had any existence and nothing passed under the act. The rights of the parties stand unaffected by it.

In any event and whatever other construction might be placed upon it, it would be bound to be always true and inseparably connected with the provisions of the Act that it was only in the event that water was conducted from the Three Mile Creek or Bayou Chatogue to the City of Mobile by December 20, 1823, that any exclusive right of carrying water into Mobile could have been claimed under it, and this never having been done no claim to such exclusive rights could arise under it. I might remark, moreover, that if this revivor of the Act of 1820 had any effect whatever in the way of reviving the 3rd

section of the act of 1820 it could have operated only in favor of the Aqueduct Company, which it was proposing to create, but which never had the breath of life breathed into it.

It must be observed also that the legislative grant to Mr. Stein of the rights, powers, privileges and immunities which could be claimed under the act of December 20, 1820, were to be such as were not inconsistent with the terms of the agreement of December 26, 1840. (See act of 1841 Sec. 2, printed Record p. 20).

The complainant claims to have somewhere obtained the right, and the exclusive right, to bring and conduct water into the City of Mobile from all sources, for the supply of its inhabitants, but he produces nothing in support of the claim excepting these few lines in the third section of the act of 1820, and he says they give him the right because of the second section of the act of January 7, 1841, but when we look at these sections we not only find that the act of 1820 was one of which the whole scheme and object was to have the water introduced *from the Three Mile Creek*, and that the first paragraph of the third section seems long since to have spent its force, but also that there is an evident inconsistency in the plaintiff's laying claim to an exclusive right, under the said third section of the act of 1820, to introduce water into the City of Mobile, and also under the agreement of December 26, 1840.

The claim under the 3rd section of the act of 1820 is of an *exclusive right from all sources for forty years*, while under the agreement of December 26, 1840, the exclusive right is *only from the Three Mile Creek and for twenty years*.

Certainly, a sole privilege for forty years from all sources is a very different thing from a sole privilege for twenty years from a definitely expressed source of supply. The two are inconsistent with each other, and being inconsistent they cannot stand together and both be held by the holder of the grant, wherein is named a specific and well-defined concession not consistent with the other. Whatever rights are taken under the acts of 1820 and 1837 must be consistent with the grant under the agreement of 1840. Under the latter there is a precise term named, and a precise and well-ascertained source of sup-

ply, and that must prevail over all other claims based on the use of general language, which might be strained to import a larger grant if no specific grant had been made. This must especially be the case in a matter of this kind where a private claim for a monopoly is set up as against a public right in which the whole community is concerned, and is based upon a contract between a private party and the public. Unless the right claimed is plainly and specifically expressed in the words of the grant it does not exist.

In this connection also I may observe that the third section of the act of 1820 under which the plaintiff would seek to claim so much, is inoperative to convey any exclusive right, excepting as coupled with two provisoes, both of which are utterly inconsistent with the plaintiff's claim. First—It was only to be operative in the event of water being introduced into the City of Mobile within three years from December 20, 1820, which was not done; and second, after the year 1860 the Water Works were to belong to the City of Mobile and be for the free use of the inhabitants of that city forever.

But it may be argued in behalf of the plaintiff that in some way he obtains a right under the Act of December 25, 1837, to the exclusive privilege claimed by him to supply the City of Mobile with water independent of its reference to the Act of December 1820, and therefore it may be well to examine somewhat further the provisions of this act with a view to seeing whether or not there can be any foundation for such a claim. It is true that the agreement of December 26, 1840, between the City of Mobile as ratified and confirmed by the Act of the Legislature of January 7, 1841, grants to Albert Stein, his executors, etc., the sole privilege of supplying the City of Mobile *with water from Three Mile Creek for twenty years*, etc., from December 26, 1840, as well as all the benefits and advantages which accrue to the said city under said Act of the Legislature of December 25, 1837, and said Act of the Legislature of January 7, 1841, grants to said Stein and his assigns, all the rights and privileges, etc., which were granted to the Mobile Aqueduct Company and to the said city by said Act of December 25, 1837, not inconsistent with the terms of said agreement of December

26, 1840. Let us see, then, what is really embraced in this Act of December 25, 1837. We find that on December 1, 1836, the said city made an agreement with Henry Hitchcock by which the said city was to lease to said Hitchcock for twenty years from that date the Mobile City Water Works, embracing the grounds at Spring Hill and the connection with the Three Mile Creek, where the fountain head was, and all pipes and appurtenances for a rent of $20,000 for the twenty years and with the understanding said Hitchcock should, during that period of time, have the *exclusive privilege of furnishing water to the Mobile people from the water works aforesa d* at certain prices therein stated, and with the privilege of changing the fountain head to any other part of said Three Mile Creek, and said city agreeing at the end of the twenty years that they would pay him for the works, etc. (Exhibit B. Printed Record, pp. 11-14.)

Then in December 1837, this act was passed which proposed to incorporate a new aqueduct company, and which, as we have seen, never went into effect. This Act in section 5, enacted that the said contract made and entered into by and between the said City of Mobile and said Hitchcock, of December 1, 1836, was thereby ratified and confirmed, and declared that *upon said Hitchcock assigning the same* to the company thereby proposed to be incorporated, that the same in all its parts should inure to the benefit of the said new aqueduct company. But as we have seen, said new aqueduct company never acquired any corporate life and so never had any existence, and moreover it is not pretended that the said agreement between said City of Mobile and Hitchcock ever was transferred or assigned by said Hitchcock to said proposed aqueduct company or any body else, and so it also must have become a dead letter. Said Act of December 25, 1837, also provided in its 8th section that so soon after December 1, 1856, as the City of Mobile should pay to said company (which never existed) the cost of said works in conformity with their said contract with said Hitchcock, then said Act of 1837 should cease to operate.

It is evident, from the statements of the bill, that in 1840

the city of Mobile was in possession of the Mobile City Water Works under some arrangement with Mr. Hitchcock, and by the terms of the said Act of 1837, it would seem to be evident that on the one hand the said Act of December 25, 1837, either never operated to pass anything under it to the proposed Mobile Aqueduct Company, or if it did then in 1840, the said Act of 1837 had ceased to operate. Not only this but if it should even be held that the said Act of 1837, went into operation to its full extent, still it will be seen by an examination of it that upon its face it does not purport to grant any right to anybody to carry water into Mobile and it is only in its reference to the Act of December 20, 1820, and to the contract of December 1, 1836, between the City of Mobile and H. Hitchcock, that any allusion is found in it to any such privileges. I have already considered the said Act of December 1820 in this connection, and therefore will not now dwell upon it. If, then, we look at the said agreement of December 1, 1836, it will be seen that the most that can be said about it would be that it only contemplated at the most that said Hitchcock should have had the exclusive privilege for 20 years from 1836, of furnishing water from his water works which were supplied from the Three Mile Creek and which 20 years expired long before the filing of this bill. It may not be unworthy of observation that if any exclusive rights had ever been acquired under the Act of December 20, 1820, they would, at all events have expired in 1860. If such rights had been acquired under the agreement with Hitchcock, of December 1, 1836 they would have expired in 1856, and if under the Stein agreement of December 26, 1840, they would also have come to an end in December 1860, excepting only the right of Mr. Stein or his successors to the use and benefit of *the water works erected by him and the advantages to be derived from them, and with which water works the defendant is not alleged in any way to have interfered.*

I apprehend the meaning of the contract of December 26, 1840, in regard to the rights and privileges which Stein and his successors were to have under the Acts of December 20, 1820, and December 25, 1837, and of all ordinances and resolutions passed by the city authorities under and by virtue of the Act

of incorporation of the said city and the several acts amendatory thereof, which related to the water works etc., must be taken to be that the object of this provision and the intention of the parties was simply to assure to Mr. Stein the benefits and advantages provided by those statutes and ordinances in facilitating him in the erection of his proposed works, and their protection against malice and damage while in his possession. Such means of protection to the property were of importance to Mr. Stein in the work he had undertaken, and were purposely inserted in the contract for his security, and for the punishment of persons who might wantonly or maliciously injure the plant necessary for the work, or who might from sinister motives waste the water in the course of conveyance to the city. The provisions of these acts are mainly devoted to this purpose. They were benefits and advantages proper for the enjoyment of the privilege granted to him. They were not an independent grant to him of rights, but were the assuring to him of benefits and advantages incidental to the grant of the privilege of water supply which had been made to him.

This view of the meaning of the language in relation to the benefits and advantages under the acts of 1820 and 1837, and the ordinances of the city, which it was agreed should be assured to Stein, harmonizes all parts of the agreement and the act of 1841, and gives effect to every term and provision thereof. It removes all inconsistency between the different portions of the contract and avoids the destroying one portion of the contract, by giving an inconsistent meaning to another portion. Otherwise, on the theory of complainants, the language and grant in relation to the acts of 1820 and 1837, which are plainly incidental and in aid of the specific grant, are made to overrule the specific grant of a right to supply from a named source for a certain period of time, and substitutes therefor by general words a right of supply unlimited by place, and for a period of time different from and in excess of the period specifically granted by one of the parties and accepted by the other.

It is very evident that the grant of all the advantages and benefits which could accrue *from ordinances and resolutions*

passed by the city authorities could operate only to facilitate Mr. Stein and his successors in the exercise of his rights under the grant made to him to introduce the water into the city from the Three Mile Creek, and it is certainly fair to suppose that this also was their intention in granting as well the *advantages and benefits* which would have accrued to the city authorities if they were going on themselves to introduce the water.

In any event I respectfully insist, under the principles of law that are applicable to such a case, there is no ground whatever for any claim on the part of the plaintiff to a right to any exclusive privilege of introducing water into the City of Mobile for the use of its inhabitants, at all events from any point or place other than some part of the Three Mile Creek.

It would seem to be also contended by complainant that there was granted by the State to Mr. Stein and his successors the *exclusive privilege* of using the streets of Mobile for the purpose of laying pipes or conduits, through which to bring water for the supply of the city, and that the privileges granted by the State to the defendant to lay pipes in the streets for the purpose of conveying water to said city is plainly in derogation of the State's grant to Stein, and the plaintiff seems to rely upon the case of the New Orleans Water Works Company vs. Rivers in 115 U. S. R., as very much like the present case, but I apprehend an examination of the two cases will show a very wide distinction.

In the Louisiana case, the grant from the Legislature was for fifty years from the date of the act of "the exclusive privilege of supplying the city of New Orleans and its inhabitants *with water from the Mississippi or any other stream* or river by mains or conduits, and for erecting and constructing any necessary works or engines or machines for that purpose," and for which purpose it could lay and place conduits, pipes or aqueducts in the streets, public places and lands of the city. (See 115 U. S. R. 677.)

The act in that case concluded with the declaration "that nothing therein shall be so construed as to prevent the city

council from granting to any person or persons *contiguous to the river* the privilege of laying pipes to the river, exclusively for his or their own use" (See 115 U. S. R. 679).

The Court found that the appellee, Rivers, had attempted to carry the water through the streets of New Orleans from the Mississippi river, by permission of the city authorities, to his hotel in order to supply it with water from the Mississippi river, although the proofs showed that his hotel *instead of being contiguous to the Mississippi river was many blocks distant from it*, and the Court held that under these circumstances the appellee's attempt to lay pipes and conduct the water from the Mississippi river was plainly in derogation of the State's grant to the appellant (See 115 U. S. R. 682).

I fail to see in this any reason whatever for any claim that the case of the New Orleans Water Works Company vs. Rivers gives any support to the claim here set up in behalf of Mr. Stein.

ANOTHER VIEW OF THE CASE.

It really seems to me that a brief argument, but quite sufficient for the full support of the Appellee's side of the case, might be presented as follows, viz: The plaintiff claims to be possessed of the exclusive right to supply the City of Mobile and its citizens with water at certain fixed prices to be paid to him, and that this right will continue until the said city shall have purchased from him and paid him for the cost of what are known as the Stein Water Works, at certain prices to be ascertained in the manner set forth in his bill of complaint. Then he claims that the defendant, the Bienville Water Supply Company has interfered, and is interfering, with these alleged exclusive rights, and asks the interference of the Court of Chancery to enjoin and restrain the said defendant from the continuance of such interference. The complainant sets forth in his bill certain agreements and acts of the Legislature of the State of Alabama, under and by virtue of which he claims to be entitled to the rights asserted by him, and he also sets forth an act of

the Legislature of the same state which he says is in violation of his vested rights, because it was passed long after his rights had become vested, and undertakes to confer upon the defendant a right to supply water to the city and citizens of Mobile in violation of his alleged exclusive right to supply said city and its citizens with water.

The defendant demurred to the bill of complaint, and insists as ground of demurrer, among other things, that even if it admits the allegations of the bill to be true they would not show that the complainant is entitled to any such exclusive rights as are claimed by him.

The plaintiff, in his bill of complaint, sets out a copy of a charter alleged by him to have been granted by the Legislature of the State of Alabama to the defendant, before the filing of the bill of complaint, from which it clearly appears that the Legislature has granted to the defendant the right to supply the inhabitants of Mobile with water from any and all sources excepting only the waters of the Three Mile Creek.

The complainant contends, that the Legislature had no right to make such a grant to the defendant, because he alleges that the Legislature had previously granted to one Albert Stein and his successors, the absolute and exclusive right to supply said city and its inhabitants with water at certain fixed prices, which exclusive right was to continue until the City of Mobile should have paid said Stein or his successors for the value of his Water Works, which it has never done, and that the said complainant as executor of said Albert Stein has succeeded to his rights.

The plaintiff claims that the said right of Albert Stein, to which he as his executor alleges he has succeeded to be entitled, to the exclusive right to supply the city and citizens of Mobile with water from any and all sources until the Water Works known as the Stein Water Works shall have been purchased and paid for by the said City of Mobile, is given by the terms of a certain agreement between the said City of Mobile on the one side and said Albert Stein on the other, bearing date December 26, 1840, and the ratification thereof by the Legislature of the State of Alabama by a statute approved January 7, 1841, a

copy of which said agreement and act of the Legislature he says is attached to his bill as Exhibit D. thereto, and is to be found on pages 16 to 20 inclusive, of the printed record.

If then we bear in mind the principles of law applicable to such a case, to the effect that in considering claims to grants of exclusive privileges, such supposed grants are never to be extended by construction beyond the plain terms in which they are conferred, as the rule is stated by Judge Cooley and numerous other authorities, I think an examination of this agreement and act of the Legislature will show that the claim of the plaintiff cannot be supported.

It will be remembered that the claim of the plaintiff is that the Legislature of Alabama gave to said Albert Stein and to plaintiff as his successor, the exclusive right to supply the city and citizens of Mobile with water, not only from the Three Mile Creek but also from all other sources, and that this right has been violated by a grant to the defendant, of the right to supply said City of Mobile with water from sources other than the Three Mile Creek.

Turning then to the agreement of December 26, 1840, as ratified by the act of the Legislature of January 7, 1841, we find the language of the agreement (p. 16 of the Printed Record, MSS. p. 57) is that said Albert Stein and his executors, etc., *were to have the sole privilege of supplying the City of Mobile with water from the Three Mile Creek for twenty years from the date of that agreement.* This was all. The agreement provided that Stein was to build his Works within two years from December 26, 1840, or he would forfeit all his privileges (p. 19 of Printed Record, MSS. p. 68), and it also provided that while building his Works he should have quiet possession of *them*, and also after they were built, and have the exclusive privilege of supplying water to the inhabitants of Mobile from his said *Water Works*, at certain named prices, and to continue so to supply water from said Water Works for 20 years afterwards, and for any further time until the said City, or its successors, should pay him for the said Works in the manner provided for in said agreement (see pp. 17-18 Printed Record, MSS. pp. 60-62).

It is evident that here the only plain and unmistakable grant of privilege to Mr. Stein and his successors was: First—an exclusive privilege for 20 years of delivering water *to the inhabitants of Mobile from Three Mile Creek*, and second, the exclusive right in Mr. Stein and his successors of supplying water to the citizens of Mobile, after the expiration of the said period of twenty years, at certain fixed prices, *from the Water Works which he contracted to erect.*

It is true that this agreement of December 26, 1840, after saying that the said City of Mobile grants to the said Albert Stein, his heirs, executors, administrators or assigns, the sole privilege of supplying the City of Mobile with water from the Three Mile Creek, for twenty years from the date of the agreement, goes on to add as follows, viz: "as well as all the advantages and benefits which accrue to the said Mayor, Aldermen and Common Council from, by or under an act of the Legislature of the State of Alabama, entitled 'An act to incorporate an Aqueduct Company in the City of Mobile, passed December 20, 1820,' and all ordinances and resolutions passed by the said Mayor and Aldermen of the City of Mobile, under and by virtue of the said act, or by the act of incorporation of the said City of Mobile, and the several acts amendatory thereto, which in any way or manner relate to the said City Water Works or the right to supply the said city with water, as well as all the benefits and advantages which accrue to the said Mayor, Aldermen and Common Council, the Mayor and Aldermen of the City of Mobile from, by or under an act of the Legislature of the State of Alabama entitled an act to incorporate the Mobile Aqueduct Company, passed December 25, 1837;" but it then goes on to show also that it was the intention of the parties that the said Stein and his successors were in the very language of the agreement "to have and to hold these above mentioned and described privileges, together with all and singular, the appurtenances unto the same belonging or in any wise appertaining unto the said Albert Stein, his executors, administrators and assigns from the date thereof," *only* "[redacted] *for, during and until the full end and term*

of twenty years thence next ensuing. (See Printed Record pp. 16-17, MSS. pp. 57-58.)

It is therefore evident, whatever rights or privileges under the acts of the Legislature of 1820 and of 1837 were intended under this agreement to have been granted to said Albert Stein or his successors, these, as well as the exclusive privilege of supplying water from the Three Mile Creek, were intended to expire at the end of twenty years from the date of the agreement which was December 26, 1840.

It necessarily follows, therefore, that under this agreement Albert Stein and his successors could claim no benefit from the acts of 1820 and 1837, or either of them, after December 26, 1860. Moreover, if there were any doubt that the true intent and meaning of the said agreement of December 26, 1840, was that the said exclusive privilege of supplying Mobile with water from the Three Mile Creek, and also any benefits and advantages which the said Stein and his successors were to have under the acts of December, 1820, and December, 1837, etc., were to expire at the end of 20 years from the date of the agreement, still, as we have already seen, (see pp. 19-21 of this brief) any benefits under the said acts of 1820 and 1837, which could be claimed to have passed to Albert Stein or his successors by virtue of the said agreement of December 26, 1840, would be only such as were merely *incidental* to the main thing intended to be granted by the said agreement, and to which it was appended, viz: the grant of the sole privilege of *supplying water from Three Mile Creek for twenty years from that date.*

Not only is it the proper construction of the agreement of December 26, 1840, and of the act of ratification of January 7, 1841, that the grant of the exclusive privilege of supplying the City of Mobile with water from Three Mile Creek for 20 years from December, 1840, expired in 1860, and that the grant therein of privileges under the acts of 1820 and 1837 was intended as an incident thereto and expired with it at the expiration of 20 years from December 26, 1840, but I apprehend a careful examination of the said acts of 1820 and 1837, in connection with the said agreement of December 26, 1840, will show no reasonable ground for contending that any exclu-

sive right could have passed to said Albert Stein, or his successors, to supply the City of Mobile and its inhabitants with water from any and all sources for such a period of time as is now insisted upon by the plaintiff.

Upon this branch of the case I beg leave to refer also to the opinion of Judge Toulmin upon sustaining the demurrer of the defendant in the court below. I would also remark that while I find that the Legislature of Alabama granted to Mr. Stein and his assigns the power to use the public roads and streets of the City of Mobile in laying pipes, etc., I do not see any statement at all of the legislative will that it should be a privilege to be exercised by them *to the exclusion of all or any other parties.*

As we have already seen, it would seem from an examination of the act of December 20, 1820, (to be found on pages 7 to 10 inclusive of the Printed Record,) that it was passed with the sole object and intention of granting a charter to certain named individuals with the necessary power and authority to enable them to conduct a supply of water from a certain named source, (*the Three Mile Creek*) into the City of Mobile, and to give them the power upon doing so *within three years*, to charge certain prices for the use of their water to all such persons as chose to use it with the express provision however, in effect in the fifth section. that no person should be required to use it, and also with the two express provisions in the third section, viz: First, that said corporation and its successors should have and enjoy the exclusive right and privilege of conducting water for the supply of said city for forty years, *provided* they should within three years from December 20, 1820, conduct the water from said Three Mile Creek into said city in the manner therein called for and provided. Second, that after said 40 years said Water Works should become the property of said city for the free use of its inhabitants forever.

Now it is not alleged or pretended that the water was introduced into Mobile within the three years required by the terms of said act, so that it would seem, first, to be idle for the plaintiff to contend that he is now, or ever was entitled to claim any exclusive privilege under the terms of this act.

Second—If the water had been so introduced into the city in

conformity with the requirements of the act, still it would have ceased to operate in 1860, or nearly 30 years before the plaintiff's bill was filed.

Not only this, but as we have seen the act of 1820 provided that in case the water was introduced within the three years required by the act, then in the year 1860 the Water Works should become the property of the City of Mobile for the free use of its inhabitants, while the contention of the plaintiff is that long after the year 1860, he is entitled to the exclusive ownership of the Water Works, and to exclude the City of Mobile and its inhabitants from any use or benefit of the same except upon the condition of full payment to him for such use by them.

Not only this, but we find that in December, 1824 (as shown by the plaintiff on pages 1-2 of the printed record) the Legislature of Alabama passed an act by which they declared that the said Act of December 20, 1820, was null and void, and although this act of 1824 goes on to say that "all the rights, privileges and immunities, powers, prerogatives and authority *which appertained to the said company by virtue of the aforesaid act are hereby transferred to and vested in the Corporation of the City of Mobile*," etc., yet it is evident that this cannot help the complainant in this case. It will be observed that under this provision it would be only all such rights, etc., as in 1824 *appertained to the Mobile Aqueduct Company by virtue of the said Act of 1820*, which could have passed to the City of Mobile under and by virtue of the Act of 1824. For all other purposes and in all other respects the Act of 1820 was declared null and void. It had no longer any existence. It is very certain, then, that "*in 1824, no right whatever could have appertained to the Mobile Aqueduct Company* under the said Act of December 20, 1820, to any exclusive power or authority for bringing water into the City of Mobile under Section 3 of said Act of 1820, for forty years, or any period of time whatever, for the reason that they had utterly failed to introduce the water into Mobile within three years from December, 1820, which had been made a condition precedent to the existence of any such right in said aqueduct company.

It is very evident, then, that there can be no ground for

contending that under the Act of 1824, any exclusive privilege passed to the City of Mobile or to any other party or parties such as was originally intended to have been granted by the Act of 1820 to the Mobile Aqueduct Company in case that company had complied with the proviso requiring the introduction of the water from Three Mile Creek into the City of Mobile within three years from December 20, 1820. From and after the passage of the Act of December, 1824, I apprehend, so far as the plaintiff in the present case is concerned, the Act of December 20, 1820, may as well be read as if the 3rd section of the act had never existed. In other words said Act of 1820, from and after December, 1824, may be considered as authorizing the carrying of water from Three Mile Creek to the City of Mobile and regulating the laying of pipes and charges to be made for water supplied by any company authorized to act under it, but further than this it had no operation or effect.

This again will serve to show that in the grant to Stein and his successors by the agreement of December 26, 1840 and the ratification thereof by the Legislature of January 7, 1841, of such rights, etc., as the City of Mobile possessed or was entitled to under said Act of December 20, 1820, it was intended to speak of this only as incidental to what must be considered as the main or principal thing granted, viz:, the sole privilege of bringing water for 20 years, from the Three Mile Creek, etc.

It is then, I apprehend, apparent that the plaintiff cannot properly claim that Mr. Albert Stein or his successors can be entitled under or by virtue of the grant in the agreement of December 26, 1840, of any advantages accruing to the City of Mobile under the Act of December 20, 1820, to claim that they obtained or held any such exclusive right to supply the City of Mobile with water as is now contended for, and I apprehend also that an examination of the Act of December 25, 1837, referred to in said agreement of December 26, 1840, will also suffice to show that that Act of December 25, 1837, does not yield any support or countenance to the said exclusive claims of the complainant.

By referring to the agreement of December 26, 1840 (to be found on pages 16 to 20 of the printed record, particularly

page 16) it will be seen the grant to Albert Stein and his successors was *of all benefits and advantages which accrued to the corporate authorities of the City of Mobile from, by or under the said Act of the Legislature of December 25, 1837.*

What, then, were the benefits and advantages which so accrued to the City of Mobile under said Act of December 25, 1837?

By reference to said act to be found on pages 14 to 16 of the printed record it will be seen it was only an act to incorporate a Mobile Aqueduct Company and which was not to take effect until $100,000 of capital stock had been subscribed, and when thereafter an election for officers had been held, and it is nowhere shown or alleged that the required amount of stock was subscribed or any election ever held. It would seem then the Company never had any existence, nor is it shown that any benefits or advantages under it ever accrued to said City of Mobile.

Moreover said Act of 1837 nowhere contains any provision which purports in any way to convey to said Albert Stein or his successors any such exclusive right as is contended for by the complainant to supply the city and inhabitants of Mobile with water from any and all sources until said water works should be purchased and paid for by the City of Mobile.

In this last view of the case which I have been considering I have been looking at it as a question depending upon the terms of the agreement of December 26, 1840, as ratified by the Act of the Legislature of 1841, without any especial examination of the Act of January 7, 1841, but it will be readily seen an examination of that act will not affect the question.

This act is to be found section 1, on page 16, and sections 2, 3, 4 and 5, on page 20, of the printed record. An examination of this act will show that it was simply intended to legalize, ratify and confirm the said agreement of December 26, 1840, and therefore what I have said in regard to the effect of the agreement of December 26, 1840, applies also to the effect of the act in ratification of it.

It seems to me beyond a question that the agreement of December 26,1840, as ratified and confirmed by the Legisla-

ture of the State of Alabama, was intended to grant and did grant to Albert Stein and his successors the sole and exclusive privilege of supplying the City of Mobile with water *from the Three Mile Creek* for twenty years from the date of the agreement, viz:, December 26, 1840, with power and authority for that purpose to make use of the public streets and roads of the City and County of Mobile, and to exact pay for the use of such water from all persons in the said city who might see fit to use the water they might furnish, and with the understanding that the right of said Stein and his successors to use and *control the water works erected by* them under their authority so given and *to be paid for water furnished from them* should not be interfered with by any body for 20 years after December 26, 1840, nor at any time thereafter until the City of Mobile should have paid said Stein or his successors the cost of the said water works so to be erected by them in the manner provided by the said agreement.

It seems to me also, that the said agreement of December 26, 1840, and the Act of the Legislature in ratification of it cannot be held or construed to have interfered in any way with the right of the Legislature to grant to the defendant or to any other party or parties as it might have seen fit, the right at any time, and particularly after December 26, 1860, to introduce water into the City of Mobile from any other source whatever than that of the Three Mile Creek and to supply the inhabitants of said City from any other such sources upon such terms and conditions as said Legislature might see fit to impose.

It clearly follows, then, that the Legislature was fully authorized to grant to the defendant, the charter of which the plaintiff now complains, and that the demurrer of the defendant to the bill of complaint was properly sustained in the Circuit Court.

POLICE POWER.

It may not be amiss perhaps for me, also to invite the attention of the court to the question of the effect of the police power of the State upon such a case as this.

We would suggest the query whether this is not one of

those cases in which the *public health and safety* are so involved, that even if the action of the Legislature would or could bear the construction contended for by the Appellant, still the Legislature of Alabama would have possessed the power to legislate in such a manner anew upon the same subject as might, in their wisdom and judgment have seemed to be necessary or proper for the public health, etc.

It has been frequently held by this court that "the power of a State Legislature to make a contract of such a character that under the provisions of the constitution it cannot be modified or abrogated, does not extend to subjects affecting public health or morals so as to limit the future exercise of power on those subjects to the prejudice of the general welfare."

111 U. S. R., 746; Butchers' Slaughter Co. vs. Crescent City Co., and many cases cited.

So in 97 U. S. R. 25, the 4th head note is "as the police power of a State extends to the protection of the lives, health and property of her citizens, the maintenance of good order, and the preservation of public morals, the Legislature cannot by any contract divest itself of the power to provide for these objects."

97 U. S. R. 25, 33;
See also 97 U. S. R. 669;
101 Ib., 814, 818;
115 U. S. 681-2.

On page 751 of 111 U. S. R., the court, in speaking of the powers of the Legislature, says: "We think that in regard to two subjects, it cannot by any contract limit the exercise of those powers to the prejudice of the general welfare. *These are the public health* and public morals. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime. It cannot be permitted that when the constitution of a State, the fundamental law of the land, has imposed upon its Legislature the duty of guarding by suitable laws the health of its citizens, especially in crowded cities, and the protection of their persons and property by suppressing and preventing crime, that the power which enables it to perform

this duty can be sold or bargained away under any circumstances as if it were a mere privilege which the Legislature could dispose of at its pleasure." 111 U. S. R., p. 751.

The court goes on to say: "This principle has been asserted and repeated in this court in the last few years in no ambiguous terms." 111 U. S. R. 751.

The first case referred to as showing this, was the case of Boyd vs. Alabama, reported in 94 U. S., 645.

See 111 U. S. R., 751-2.

In the case of the Beer Co. vs. Massachusetts, which is reported in 97 U. S. R., this court says: "The court, speaking by Mr. Justice Bradley, held that on this subject the Legislature of Massachusetts *could make no irrepealable contract.* Whatever differences of opinion, said the court, may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, *health and property* of the citizens, and to the preservation of good order and public morals. *The Legislature* cannot by any contract divest itself of the *power to provide for these objects.* They belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex*, and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. *That discretion can no more be bargained away than the power itself.*"

111 U. S. R., 752.

In the case of the Butchers' Union Co. vs. Crescent City Co., the court goes on to speak of the case of Stone vs. Mississippi, reported in 101 U. S. Rep., in which the court says, "No Legislature can bargain away the public health, or the public morals. The people themselves cannot do it, much less their servants. *The supervision of both these subjects of governmental power is continuing* in its nature and they are to be dealt with as the special exigences of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. *For this purpose the legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.*"

111 U. S. Rep., 753.

See also the cases themselves cited in this opinion, particularly 97 U. S. R , (14th head note) 33 and 669; 101 U. S. Rep., 814, 818; 115 U. S. Rep., 681-2.

In the case of the Butchers' Union Co. vs. Crescent City Co., the Louisiana Legislature had granted in the year 1869 to the Crescent City Co., exclusive privilege for stock landing and slaughter houses at New Orleans for 25 years.

In 1879 the State of Louisiana adopted a new constitution, containing these provisions, viz:

"Article 248.—The police juries for the several parishes and the constituted authorities of all incorporated municipalities of the State, shall alone have the power of regulating the slaughtering of cattle and other live stock within their respective limits, provided no monopoly or exclusive privilege shall exist in this State, nor such business be restricted to the land or houses of any individual or corporation; providing the ordinances designating places for slaughtering shall obtain the concurrent approval of the Board of Health or other sanitary organization. Article 258.—The monopoly features in the charter of any corporation now existing in the State, save such as may be contained in the charters of railroad companies, are hereby abolished."

111 U. S. R., 748.

In 1881, under the provisions of this new constitution, the municipal authorities of New Orleans granted privileges for slaughter houses and stock landings at New Orleans, to the Appellant, the Butchers' Union Co. The Appellee, the Crescent City Co., as plaintiff below, filed its bill in the U. S. Circuit Court to restrain the Butchers' Co. from exercising the privileges thus conferred. The Circuit Court granted a preliminary injunction, and upon the final hearing made it perpetual, but on appeal to the U. S. Supreme Court, the decree of the court below was reversed and the bill of the Crescent Co. was directed to be dismissed.

111 U. S. Rep., 746-754.

It was in considering that case that the language was used by this court, which I have quoted from 111 U. S. Rep., 751-753.

It will be observed in that case, it being clearly and plainly held, that under any and all circumstances, the Legislature of a State as to matters which concern the public health, etc., retains the power at all times to legislate as in its judgment the public good may require, notwithstanding any previous legislation it may have had, that in this particular case where by a constitutional provision, a portion of this power was granted to the municipality of New Orleans, and that municipality had exercised a part of that police power, it was held to be well exercised.

In that case, although the Crescent City Co. had by an act of the Legislature of the year 1879, the grant of exclusive privileges for slaughter houses, etc., in New Orleans, until the year 1904, yet the court held, as this was a matter affecting the public health the Legislature would have had a right at any time to exercise its discretion in modification or alteration of the grant as they might consider the interests of the public health might require, and inasmuch as by a new constitution of the State, this power as a matter of public policy was bestowed upon the municipality of New Orleans, the court held that when this municipality in its discretion saw fit to grant to the Butchers' Co. the authority to establish such slaughter houses, although it interfered with what had theretofore been regarded as an exclusive privilege of the Crescent City Co., yet such grant to the Butchers' Company was valid and must be upheld.

Now in the case at present before the court, it will be seen by reference to the act of the Legislature of Alabama of December 20, 1820, to be found in the printed record, pages 7-10, that it is declared on the face of the act that the reason for passing the act in favor of the Mobile Aqueduct Company, was that it was represented "*it would be of singular advantage to the health and convenience of the City of Mobile to be supplied with water from some of the running streams in its vicinity*," &c., particularly naming the Three Mile Creek, and then going on to incorporate the Mobile Aqueduct Company for the purpose of bringing water into the City of Mobile from said creek.

(See Printed Record, pages 7-10 inclusive).

So also it will be seen by reference to the act of January 7,

1841, it is entitled "an act for the promotion *of the health* and convenience of the City of Mobile, by the introduction into the said city of a supply of wholesome water to be used for domestic purposes and the extinguishment of fire, etc. (See the act exhibit D, Printed Record pp. 16-20.)

It is nothing strange in view of this position of things that in 1883, the Legislature should have made its new charter to the Bienville Water Supply Company, in which the preamble recites as follows, viz: "Whereas, the inhabitants of the municipality known as the Port of Mobile, and the inhabitants of Whistler, in the county of Mobile, *are not provided with an adequate supply of water for domestic and municipal purposes; and, whereas, it is essential to the public health of the citizens of those towns* and to the *protection of their property and the public property therein* against conflagration, that an abundant supply of water should be introduced and furnished to said citizens."

See preamble to act to incorporate Bienville Supply Company attached to bill (Printed Record pp. 23-24).

And again in section 6 of said act, that said corporation should be charged with the duty of introducing into Mobile, etc., such a *supply of pure water as the sanitary, domestic and municipal wants thereof may require* (Printed Record p. 25).

Under these decisions and with these facts and this charter in view, it would seem to be evident that the Legislature of Alabama had the rightful authority, and that it has seen fit to use it to grant to the defendant in this case the right to lay down its pipes and to bring water into the City of Mobile for the use of the inhabitants thereof, at least from any other point than Three Mile Creek, notwithstanding any complaint which may be made by Mr. Stein of any supposed interference with him.

The question may then be asked, how does this correspond with the decisions of the Supreme Court in the case of the New Orleans Water Works Company vs. Rivers, in 115 U. S. R., and of St. Tammany Water Works Company vs. New Orleans Water Works Company, in 120 U. S. R. 64. In reply I beg to say that it seems to me the distinction can be easily drawn.

In the case of the New Orleans Water Works Company vs. Rivers, in 115 U. S. R., the State of Louisiana, by an act of the Legislature, granted the New Orleans Water Works Company an exclusive right to supply the City of New Orleans with water for a period of fifty years, and that company went on to do so. In 1879 a new constitution of the state was adopted, which contained this provision, viz: "Art 258. All rights, actions, prosecutions, claims and contracts, as well of individuals as of bodies corporate, and all laws in force at the time of the adoption of this constitution, and not inconsistent therewith, shall continue as if the said constitution had not been adopted. But the monopoly features in the charter of any corporation now existing in the state, save such as may be contained in the charters of railroad companies, are hereby repealed."

Under this the corporate authorities of the City of New Orleans undertook to grant to the defendant, Rivers, who seems to have been the lessee of the St. Charles Hotel in New Orleans, the right to supply the said hotel with water from the Mississippi river. The New Orleans Water Works Company, under its grants from the State of Louisiana, filed its bill to enjoin Rivers from proceeding under the authority which the corporate authorities of the City of New Orleans had undertaken to grant to him (see 115 U. S. Rep. 674, et seq).

In the case in 115 U. S. R., the principle decided in 111 U. S. R. 746 is not at all disputed, but on the contrary it is directly recognized when it says, "The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals and the public safety in the same sense as are all contracts and all property, whether owned by natural persons or corporations" (115 U. S. R. 681-682).

In the Rivers case there was no showing of any necessity on the score of the public health for the grant of the New Orleans municipal authorities as made to Rivers, *nor was there*

any showing that the State had ever undertaken to give to those municipal authorities any power to legislate in the premises. The power to act, in case the public health required it, was in the State and not in the corporation of New Orleans. The case shows, too, that it was on a mere matter of convenience or of profit to Rivers, *and clearly the power was not in the municipality to act* (see the case 115 U. S. R. 674-682).

The only power given to the City Council of New Orleans to make such a grant (and it was under a grant from this City Council that Rivers claimed) was *that said Council could grant to persons contiguous to the river* the privilege of laying pipes to the river, provided they should be only for their own use (see 115 U. S. R. 679), and the case shows that Rivers was not contiguous to the river (see 115 U. S. R. 682).

It was strenuously argued for the plaintiff in the Court below, and probably will be in this Court also, that the case of the New Orleans Water Works Company vs. Rivers in 115 U. S. R. was in favor of his position, but an examination of the opinion in that case would seem to show that while the Court held that an exclusive privilege had been granted to supply the people of New Orleans with water yet *the power still remained with the State* "to make such regulations as would secure to the public the uninterrupted use of the streets, as well as prevent the distribution of water unfit for use and *provide for such a continuous supply and quantity as protection to property, public and private, might require*" (115 U. S. R. 681).

We respectfully submit that this is in effect an affirmance of the proposition contended for by us, that whatever might be the effect of the grant to Mr. Stein to supply the inhabitants of Mobile with water, it could not interfere with the power and the right of the Legislature to provide as it has done by its charter to the Bienville Water Supply Company, for an increased and abundant supply of water when it saw it was required, both for the protection of property of and the health of the people (see also 115 U. S. R. 683, (2nd head note).

It was also argued in the Court below, and I presume it will be in this Court also, that the case of the St. Tammany Water Works Company vs. The New Orleans Water Works is

also strongly in support of the appellant's case. An examination of the St. Tammany Company case will show as in the New Orleans Water Works Company case against Rivers that the New Orleans Water Works Company had obtained from the Legislature of Louisiana in March, 1877, (and while it had the constitutional power) a grant of an exclusive privilege to supply the people of New Orleans with water *from the Mississippi river or any other stream or river* (120 U. S. R. 64).

The only authority the St. Tammany Company had was derived from a *voluntary organization* of citizens under the general law of Louisiana relating to corporations, whereby they declared their object to be to furnish the inhabitants of New Orleans and other places with pure water etc., (120 U. S. R. 66).

The St. Tammany Company being about to carry water into New Orleans, the New Orleans Water Works Company filed its bill to enjoin them from doing so, and it succeeded in this suit upon the evident ground that neither the State of Louisiana nor even the municipal government of the City of New Orleans had given it any authority. In that case, the Court, in delivering its opinion, through Mr. Justice Harlan, remarked that *no question arose in that case* as to whether the State or municipal government of New Orleans might not, if the public health, or public comfort, so required, compel the New Orleans Water Works Company, then having the exclusive right of supplying the City of New Orleans with water (or, if it refused, to employ other agencies) to supply the water that might be required (120 U. S. R. 67).

The Court then went on to intimate that inasmuch as neither the State nor the City of New Orleans had given its assent to the St. Tammany Company's use of the streets of the city for its pipes, nor determined that it was for the public health or the public comfort that the St. Tammany Company should proceed, and these were matters which the individuals concerned in the St. Tammany Company could not determine for the constituted authorities, therefore, the suit of the New Orleans Water Works Company must prevail (120 U. S. R. 67-68).

A good deal of stress was laid, by the counsel of the appellant, in the lower Court, also upon the case of the New Orleans Gas Company vs. The Louisiana Light Company in 115 United States Reports as being in support of their views and I will respectfully ask the indulgence of the Court while I consider, to some extent, the question of how far this last named case should have any influence upon the case which is now before the Court.

In the case of the New Orleans Gas Company vs. the Louisiana Light Company, the New Orleans Gas Company was the result of a combination of the New Orleans Gas Light Company and the Crescent City Gas Light Company which was authorized by Acts of the Legislature of Louisiana, commencing in 1835 and amended, renewed and extended until the year 1875 whereby (the Legislature then having the power to grant such exlusive powers) authority was given to it for a space of fifty or more years from April, 1875, to have the sole and exclusive privilege of making and supplying gas lights in the city of New Orleans by means of pipes or conduits laid on the streets to such persons or corporations as might voluntarily choose to contract for it. (See 115 U. S. R. 651-654.)

The defendant in that case, viz:, The Louisiana Light Company was only a corporation organized under a general law of the State of Louisiana providing for the formation of corporations for certain purposes among which are the construction and maintenance of works for supplying cities or towns with gas. (See 115 U. S. R. 650.)

It was not contended or pretended in that case that the Legislature of Louisiana ever passed any act or took any sort of action declaring the necessity in any way for the preservation of the public health or protection of life or property that the Louisiana Light Company should be called into existence, but it was simply contended for the Louisiana Light Company that while the charter of the combined companies constituting the New Orleans Gas Company was in existence giving that combination the exclusive right to supply the inhabitants of New Orleans with gas, that the passage of a new constitution for the State of Louisiana in 1879, which declared absolutely

that all monopoly features in the charter of every corporation existing in the State, excepting such as were contained in rail road corporations were thereby abolished, operated at once the destruction of all those exclusive rights which had been granted to the New Orleans Gas Co. That was evidently a very different case from the one now before the Court. In that there was no attempt to show that the creation or existence of the Louisiana Light Company was at all necessary or material for the preservation of the morals, health or property of the public. There was no attempt to show either that the existence of the Louisiana Light Company or its mode of operations was or was supposed to be any more beneficial to the preservation of the morals, health or property of the public than was the existence or mode of operations of the New Orleans Gas Company. In other words in that case it is evident that the question of what a State might or might not do in the exercise of its proper police powers does not at all arise. In the case now before the Court, on the other hand it is shown upon the face of all the legislation that the Legislature had at all times prominently in view the making of provision for the public health and safety and in the charter granted to the defendant the preamble as set out in Exhibit G. to complainant's bill, reads as follows, viz: "Whereas the inhabitants of the municipality known as the Port of Mobile and the inhabitants of the village of Whistler in the county of Mobile are not provided with an adequate supply of water for domestic and municipal purposes, and whereas it is essential to the public health of the citizens of those towns and to the protection of their property and the public property therein against conflagration that an abundant supply of water should be introduced and furnished to said citizens; and whereas a company of citizens of said county propose to undertake the duty of furnishing such supply to said towns for the public use and benefit, be it enacted," etc. (See Printed Record, pp. 23-24, MSS. p. 81.)

It thus appears upon the face of the complainant's bill that the Legislature of the State of Alabama in the exercise of its sovereign jurisdiction, has passed upon the question and has declared the existence of the necessity, for the benefit of the

public health and also for the safety and preservation of the public and private property, that the powers and privileges should be granted to the defendant which the complainant is now seeking to destroy.

There is no parallel between the cases of Rivers in 115 U. S. R. and the St. Tammany in 120 U. S. R. and the New Orleans Gas Company in 115 U. S. and the case of the Bienville Water Supply Company now before the court.

In the case of the Bienville Company the defendant brings itself distinctly within the reserved power which the decisions declare exists in all cases in the State Legislature, and in such a shape that it cannot be parted with, viz: the power to legislate in such manner as it may deem advisable for the protection of the health and property of the people.

In the case of Boyd vs. Alabama this court declared "they were not prepared to admit that it was competent for one Legislature, by any contract with an individual, to restrain the power of a subsequent Legislature to legislate for the public welfare, and to that end to suppress any and all practices tending to corrupt the public morals" (94 U. S. 645, 650).

In the Beer Company vs. Massachusetts the Court went a step further and declared that "as the police power of a state extends to the protection of the lives, health and property of her citizens, the maintenance of good order and the preservation of the public morals, the Legislature cannot, by any contract, divest itself of the power to provide for these objects. 97 U. S. R. 25 (4 head note).

In the body of the opinion the Court says: "Whatever differences of opinion may exist as to the extent and boundaries of the police power and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens and to the preservation of good order and public morals. The Legislature cannot by any contract divest itself of the power to provide for those objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex; they are to be obtained and provided for by such appropriate means as the*

Legislative discretion may desire. That discretion can no more be bargained away than the power itself" (97 U. S. R. 33).

So also when a statute has been passed by the Legislature of a State it has been declared by this court on more than one occasion that "every possible presumption is in favor of its validity and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule" (99 U. S. R., 718; 127 U. S. R. 684-5).

In Stone vs. Mississippi this court again says: "No Legislature can barter away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature and they are to be dealt with as the special exigencies of the moment may require. *Government is organized with a view to their preservation and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself"* (101 U. S. R. 819).

In the case of the Butchers' Union Company vs. Crescent City Company, the court goes over the decisions which had been previously made upon this subject, and on page 753 repeats with emphasis the declaration of the court in 101 U. S. R, 819 (see 111 U. S. R. from bottom of p. 750 to middle of page 753).

And in the case of the New Orleans Gas Company against the Louisiana Light Company, the same identical language of 101 U. S. R. 819 is again repeated (115 U. S. R. 667).

In Barbier vs. Connolly in 113 U. S. R. in speaking of the 14th amendment to the United States Constitution, this court says: "Neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals,

education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks and many other objects" (113 U. S. R. 31).

In Soon Hing vs. Crowley this court declared: "The rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them except as they may be disclosed on the face of the acts or inferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments" (113 U. S. R. 710).

In the State vs. Campbell in New Hampshire the Supreme Court of that State said: "The sale of bread, the inspection of flour, beef, pork, and other provisions, the practice of medicine, surgery and dentistry, the licensing of druggists, and the sale of drugs and medicines are regulated, and the sale of spirituous or intoxicating liquors prohibited by statute. Such legislation is not open to the objection that it transcends the limits of legislative authority, the purpose and object of such legislation being the protection of the lives, health, comfort and safety of all persons; and for securing this purpose, persons and property are subject to many restraints and burdens. They are presumed to be rewarded by the common benefits secured. The statute of 1883, regulating the sale of milk, was designed to ensure the purity of an article of food of universal consumption and very largely an article of trade and commerce, many families being dependent upon the dealer for their daily supply. *Of the necessity for the statute the Legislature is the sole judge.* It clearly belongs to the class of police regulations de-

signed to prevent frauds and protect the health of the people" (13 Atlantic R. 586).

So in the same way we respectfully submit that in the case now before the court, an abundance of pure water was a matter of as much necessity as a supply of pure milk could have been in New Hampshire, and besides this an abundant supply of water was also of great importance for the protection of public and private property against fires. The Legislature of Alabama, in the exercise of its legislative discretion, came to the conclusion that it was a matter essential to the public health of the citizens of Mobile and to the preservation of the private and public property in that city, that the charter as passed should be granted to the Bienville Water Supply Company, and we respectfully submit in the language of the Supreme Court of New Hampshire that "of the necessity for the statute the Legislature was the sole judge."

The New York Court of Appeals declares that "all property is held subject to the general police power of the State to regulate or control its use to secure the general safety and the public welfare," 74 N. Y. R. 509, (4th head note, 521), citing also 7 Cush. 84, and 27 Vermont 140.

In the case of Powell vs. The Commonwealth, it seems that Mr. Powell was convicted under an act of the Legislature of Pennsylvania which provided that "no person, firm or corporate body, shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or cream from the same, any article designed to take the place of butter or cheese produced from pure, unadulterated milk or cream from the same, or imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession, with intent to sell the same as an article of food."

(See 7 Atl. R., 913 and 916).

In considering that case the Supreme Court of Pennsylvania cited with approval an opinion in a similar case in the Supreme Court of Missouri in the following language, viz: "The mere fact that experts may pronounce a manufactured article intended for human food to be wholesome or harmless does not

render it incompetent for the Legislature to prohibit the manufacture and sale of the article." (7 Atl. R., 915)

The court went on to say (still quoting from the Missouri case): "The fact that in the present state of the public taste, the public judgment, or the public prejudice, with regard to it, it cannot be sold except by cheating the ultimate purchaser into the belief that it is real butter * * * stamps with fraud the entire business of making and vending it, and furnishes a justification for a police regulation prohibiting the making and vending of it altogether." 7 Atl. R., 916.

The Pennsylvania Court then says: "In view of these and other considerations suggested in the opinion referred to, and also in that of the court below, we cannot say the act in question is not a valid exercise of the police power of the State. *The Legislature was doubtless satisfied* that the manufacture and sale of the prohibited articles were prejudicial to the public good to such a degree that a remedy was needed, and we have no right to say that a penal statute less severe and sweeping in its terms would have afforded an effective remedy. *This is a legislative and not a judicial question.*

7 Atl. R., 916.

This case was carried to this honorable court by a writ of error and the decision of the court below was here affirmed. This court in considering the case said: "The Legislature of Pennsylvania, upon the fullest investigation as we must conclusively presume, and upon reasonable grounds as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell for purposes of food, of any article manufactured out oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk, or cream from unadulterated milk will promote the public health and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those selling wholesome oleomargarine as an article of food, their appeal must be to the Legislature or to the ballot box, not to the judiciary. The latter cannot interfere without

usurping powers committed to another department of government."

127 U. S. R., 686.

We may remember the language of this court in Stone vs. Mississippi was as follows, viz: "No Legislature can barter away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed and the discretion cannot be parted with any more than the power itself."

(101 U. S. R. 819.)

And this was repeated and approved in 111 U. S. R. 753, and again in 115 U. S. R. 667.

It would seem, then, that the position of the State of Alabama remained the same after the making of the statutes under which the plaintiff claims as if the Legislature had inserted an express reservation of its right at any time afterwards, as it might see fit to exercise its legislative discretion by the adoption of such legislation as it might consider necessary or proper for the protection of the morals, lives, health or property of its citizens.

This power and authority would seem to have been one of its inherent rights which it never parted with and had no authority to part with. It always remained in the Legislature to be used and exercised whenever the occasion arose. In this instance the sovereignty of the State determined the time for its exercise had come when it granted its charter to the Bienville Water Supply Company. In the nature of things the Legislature was not called upon to submit to the judiciary the question of the time at which, or the mode in which, it should exercise the discretion which was vested in it as the sovereign and supreme authority upon that subject.

I respectfully submit, then, that even if the Legislature of Alabama had originally passed such statutes as purported

upon their face to give to Albert Stein an exclusive right to supply the city and citizens of Mobile with water from any and all sources (but which I by no means admit was the case) yet it was one of its unalienated and inalienable rights (which was necessarily reserved to it) at any time afterwards when it considered it requisite for the protection of the property or health of that city and its inhabitants that the said Legislature should have the power and authority to make such a grant as is shown here in the charter to supply the city and citizens of Mobile with water at all events from any sources of supply other than that which had been granted to said Stein.

It looks to me as if the principles announced in the opinion of the Court in the case of the Butchers' Union Company vs. the Crescent City Company may well be considered as applying to such a case as is now before the Court. (See again that case 111 U. S. R. 746 et seq.)

But whatever may be the opinion of the Court as to the authority which the State of Alabama would have had under its reserved powers in order to guard and protect the health of its citizens and preserve and protect the public and private property from time to time from danger as the necessities or changing circumstances of the case might seem to require in case it had been shown that at any time in previous years the Legislature had done any acts which contemplated at the time a grant to Albert Stein and his successors of the exclusive right to supply the city and citizens of Mobile with water from any and all sources, yet I do not think it is possible I can be mistaken in my view as presented in previous portions of this brief that no such exclusive authority was ever conferred or intended to be conferred upon the said Albert Stein or his successors.

I must respectfully insist that a candid and careful consideration of the facts and circumstances as set forth in the bill of complaint and the exhibits thereto must lead any candid and careful mind to the conclusion that at the time of the grant of the charter to the defendant authorizing it to supply the inhabitants of Mobile with water from other sources of supply than Three Mile Creek in Mobile County there was not outstanding and existing in Albert Stein or his successors any exclusive right which was interfered with by the grant to the defendant.

Upon the whole case it seems to me it is evident that the Court below was right in sustaining the demurrer to the bill and that its decision must be affirmed.

T. A. HAMILTON,
of Counsel for Appellee.

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CLERK.

In the Supreme Court of the United States,

October Term, 1890.

No. 344.

LOUIS STEIN, EXECUTOR OF THE ESTATE OF ALBERT STEIN, DECEASED, APPELLANT,

vs.

THE BIENVILLE WATER SUPPLY COMPANY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

D. P. BESTOR,
Of Counsel for the Bienville Water
Supply Company, the Appellee.

In the Supreme Court of the United States,

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THE BIENVILLE WATER SUPPLY COMPANY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This cause was instituted by a Bill filed by Appellant representing what is familiarly known as the "Stein Water Works" in Mobile, Alabama, to enjoin the Appellee, the Bienville Water Supply Company, a corporation, from introducing water into the City of Mobile to supply its inhabitants with wholesome water for domestic, sanitary and municipal purposes, Appellant claiming the *sole and exclusive right* to furnish such supply from any and all sources.

The Bienville Water Supply Company, the Appellee, is a Corporation chartered by the State of Alabama under an Act

of incorporation, approved February 19th, 1883, and amended February 14th, 1885.

Acts of Alabama 1882-3, page 451, which act is printed in the record—M. ps 81 et seq.

Acts of Alabama, 1884-5, page 489, which act is printed at length as an Appendix to this Brief.

By its Act of Incorporation this Bienville Company is granted the privileges and charged with the duty of introducing into the City of Mobile and the village of Whistler in Mobile County, such supply of pure water as the domestic, sanitary and municipal wants thereof may require. Power is given to it to acquire lands and use the public roads and streets of said City and village whereon to lay its pipes. It is authorized to make and maintain proper canals, ditches, pipes and aqueducts from any point in the County within twelve miles from the City of Mobile, and there is given to it for that purpose the exclusive right of conducting water into said City and village from any point, *other than Three-Mile Creek* for the term of twenty (20) years, running from the time when water so brought by it is ready for distribution within the limits of the City of Mobile.

Record M. ps. 86. 87, 92, 93.

In pursuance of these privileges granted to it, and of this duty so imposed on it, the Bienville Company acquired the necessary property, machinery etc., to carry out the provisions of its Charter and employed a large force of men and proceeded in laying down pipes and mains for the purpose of conducting water into the City of Mobile, from another source than THREE MILE CREEK. (Record M. ps. 20, 21, 22.)

It is nowhere charged in the Bill that the Company has interfered or intends in any way to interfere with the source of supply of water used or occupied by the Stein Works, or that it has or intends to in any way draw or use water from THREE MILE CREEK. This Company leaves to the Stein Works all the water furnished by THREE MILE CREEK and its tributaries entirely undiminished and undisturbed by it. The Company is to

get its water from another source entirely, to-wit, EIGHT MILE CREEK.

The owners of the Stein Water Works complain that their rights are infringed upon by this Company. They claim that they have the *exclusive* right to supply Mobile and its inhabitants with water from all sources, and that any attempt by any other person or corporation to introduce water into Mobile from any source whatever, is an infringement of their rights, such as should be enjoined by the Courts. In other words, they claim a monopoly of the business of supplying Mobile and its inhabitants with water, and on this theory the Bill is filed to enjoin Appellee from further prosecuting its rights of supplying water to Mobile, granted to it under its Charter.

II.

Demurrers were filed to this Bill raising three causes why Appellant should not be entitled to an Injunction and to any relief, viz:—

First. That Appellant's rights were limited to the supplying of water from THREE MILE CREEK, and that his franchise was to this extent sole and exclusive, but no further.

Second. That this franchise expired in 1860.

Third. That said franchise of Appellant granted by the Legislature of Alabama, for certain benefits, included the benefit of the health of the inhabitants of Mobile and that such Legislation as to health does not confer a sole or exclusive privilege which cannot be interfered with by subsequent Legislation.

The Circuit Court below sustained the Demurrers raising the first two points, but overruled those raising the last point.

III.

ARGUMENT.

There are two clear and elementary principles of law which we invoke for Appellee in this cause.

First. In grants of franchises of this description, no rights are taken from the public, or given to the corporation beyond those which the words of the Charter by their natural and proper construction purport to carry. "This principle is that the Charters for Corporations are to be strictly constructed *against the corporators*, and that no franchise which is granted by the State is ever construed to be exclusive, whether it be in the nature of a contract or not, unless it be so declared in clear terms or be necessarily implied, unless the element of exclusiveness appears in the grant itself." "Unless the terms of the grant render such construction imperative."

Birmingham & Pratt Mines Street Railway Company vs. Birmingham Street Railway Company, 79th Alabama 465, 472.

High on Injunctions, Section 902.

Cooley's Const. Limitations, M. ps. 394, 395, 396.

Charles River Bridge vs. Warren Bridge, 11th Peters page 420.

Tuskahoe Canal Co. vs. Tuskahoe R. Co., 11 Leigh (Va.) page 42.

This rule is universal, without exception, and rests upon sound public policy. All franchises granted to Corporations or individuals must be unmistakably expressed. What is not expressed is not granted. "In the construction of every Charter to be in doubt is to be resolved, and every resolution which springs from doubt is against the Corporation."

Grand Lodge of Ala. vs. Waddill, 36 Ala. 313, 318.

Binghampton Bridge case, 3rd Wallace 51, 75.

Jefferson Branch Bank vs. Skelly, 1 Black 436, 446.

Saginaw Gas Light Co. vs. City of Saginaw, 28th Federal Reporter, 529, 538, 539.

Beaty vs. Lessee of Knowler, 4 Peters 152, 168.

Brauley vs. New York & New Haven R. R. Co., 21 Conn. 294.

Second. It is an elementary principle of law in regard to

construing contracts and the rules of evidence as to written or private documents, that no particular part or sentence can be picked or eleminated from the whole to get at the true meaning of the intent, but that the whole must be construed together as a whole.

Bates & Hines vs. Bank of State of Alabama, 2nd Alabama 451, 463.

Sewall vs. Henry, 9th Alabama 24.

See many Alabama authorities cited in 1st Volume of Brick. Dig. p. 386, paragraph 169.

"When two writings are connected by a reference of one to the other, they are considered and construed as constituting but a single contract in the same manner as if embodied in one instrument."

1st Brickell's Digest, page 386, Section 169.

IV.

Now under these legal principles let us examine and construe this Water Works contract between Mr. Albert Stein and the City of Mobile.

"And *Whereas* it has been represented that certain individuals have agreed to associate themselves together for the purpose of conducting a supply of water from a *creek* called THREE MILE CREEK, otherwise Bayou Chatogue for the use of the citizens and other persons residing in the City of Mobile." Preamble of Acts of Alabama, December 20th, 1820 (Record M. p. 26).

"Provided the said corporation or their successors shall before the expiration of three years from the passage of this Act cause to be conducted the water from the said *Bayou or Creek* to the said City of Mobile in the manner hereinbefore proposed." Part of Section 3 of Acts of December 20th, 1820 (Record M., p. 31.

"And provided also that no person shall be *compelled to pay* the sum or sums aforesaid who does not use directly or in-

directly the water conveyed to said city as aforesaid." Latter part of Section 5 of Acts of December 20th, 1820. (Record M. p. 34.)

These are extracts from the Acts of the Legislature.

Then comes the articles of agreement between the City of Mobile and Henry Hitchcock, dated December 1st, 1836.

The first clause of this agreement states that the Mayor and Aldermen of the City of Mobile,—"Have granted, leased, demised and to farm let and by these presents do grant, lease, demise and to farm let unto the said Henry Hitchcock, his executors, administrators, and assigns the entire use, control, management, rents, profits, issues and enrollments of the Mobile City Water Works so called, embracing the ground at *Spring Hill, where the fountain is situated, and the ground* along which the pipes pass from the said fountain to the said City of Mobile," etc.

Hitchcock's contract, part of first clause (Record M. ps. 38, 39).

"And that the said Henry Hitchcock, his executors, administrators and assigns shall, during the said term of twenty years, have the exclusive privilege of furnishing to the citizens and inhabitants of the City of Mobile water from the *Aqueduct or Water Works aforesaid*," etc.

Hitchcock's contract, (Record M. p. 45).

What *Water Works aforesaid?* Evidently the Water Works of Three Mile Creek and its tributaries at Spring Hill.

"And further shall have the power and authority to make such alterations and repairs upon the said works and to erect such new works and in such manner as he may deem necessary and proper, and may, at will, change the fountain head, and *conduct the water from any part of Three Mile Creek, so called* so that the same may be good and wholesome," etc. Latter part of Hitchcock's Contract (Record M. p. 48).

This explains the language of Stein's contract on marginal page 67 of the record, which reads: "And further it is under-

stood between the contracting parties hereto that as soon as the water is introduced under this agreement, the present water works shall be abandoned and totally discontinued," as these previous water works were from a spring or fountain forming Three Mile Creek.

This contract between the City and Hitchcock was "recognized and confirmed" by the Legislature of Alabama on the 25th day of December, 1837. See Acts of Alabama of December 25th, 1837, Section 5, (Record M. p. 53).

Next in the history of this Water Contract we reach the agreement made between Stein and the City of Mobile, on the 26th day of December, 1840. It there shows, almost in the exact language of the contract of the City of Mobile with Hitchcock, that the City authorities "have granted and by these presents do grant unto the said Albert Stein, his heirs, executors, administrators and assigns, the sole privilege of supplying the City of Mobile with water from the THREE MILE CREEK for twenty years from the date of this agreement," etc., and then refers to previous legislation and ordinances. See first part of Stein's contract (Record M. p. 57).

Further on in said contract this language is used, viz: "And said party of the first part (the City) hereby covenants and agrees with the said party of the second part (Stein) his executors, administrators and assigns that he, his executors, administrators and assigns shall have quiet possession of the *said works* during their erection and after they shall be completed for the term of twenty years and for any further time until the said parties of the first part or their successors in office shall redeem the said works," etc.

Stein's contract (Record M. p. 60)

Can this mean anything but the works at Three Mile Creek and from there to the City?

Again: "That he (Stein) and his executors, administrators and assigns shall and may retain quiet possession of the *said* water works for the said term of twenty years without let, mo-

lestation or hinderance of the said Mayor, Aldermen or Common Council," etc.

Stein's contract (Record M. p. 61)

Can this refer to or mean anything but the works at THREE MILE CREEK and extending from there to the City?

Again: "And that the said Albert Stein, his executors, administrators and assigns shall, during the said term of twenty years or any further time until said works are redeemed as above stipulated have the exclusive privilege of supplying to the citizens and inhabitants of the City of Mobile, water from the *water works aforesaid*, at the sum or price," etc.

Stein's contract, (Record M. p. 62)

Take this language in connection with all that previously used, can it refer to or mean anything other than the works at THREE MILE CREEK and those connected therewith to the City of Mobile?

It is exactly the same language verbatim of the contract with Hitchcock, except the words "Aqueduct or" are therein inserted. The words of Hitchcock's Contract being "water from the Aqueduct or Water Works aforesaid at a sum or price," etc.

Record M. p. 45–M. p. 62.

And there can be no doubt about the language of Hitchcock's contract applying to THREE MILE CREEK alone. There were and are no other water works mentioned or contemplated, but those of THREE MILE CREEK.

Can this last quoted language of Stein's Contract, taken in connection with all the previous use of such language, mean or be construed to mean, anything more than that Mr. Stein shall have the privilege of supplying to the citizens and inhabitants of the City of Mobile water from THREE MILE CREEK exclusively, and that he shall not be interfered with in his exclusive right of this supply from Three Mile Creek? Does the construction bear any other interpretation when all the papers are taken together?

Neither Mr. Hitchcock nor Mr. Stein nor any other person had any right to bring the water into Mobile, to lay pipes for this purpose or to supply it from any source, until such rights should be derived from the Legislature or the municipal authority under the strict powers conferred upon it by the sovereign authority of the State. This was a valuable and remunerative franchise; viz: The right to bring water from Three Mile Creek to supply the inhabitants of Mobile, which right could not be interfered with in any way. This THREE MILE CREEK was the nearest place where water could be obtained for Mobile, and hence much the cheapest to obtain water from. It was then and continued to be a valuable monopoly for such reasons. This was and is Stein's legal right. It can go no further, for he has not the right to supply water from any other source or to prohibit the city or any person from supplying from any other source. His franchise is confined to THREE MILE CREEK. The City, of its own right, was not authorized to contract with any person or party for the exclusive right of supplying it with water. That was beyond its powers. Whatever power it had to contract for water supply depended on the power conferred on it by the soverign authorities of the State.

Birmingham & Pratt Mines St. Ry. Co. vs. Birmingham St. Ry. Co., 79th Alabama 465.

Saginaw Gas Light Co. vs. City of Saginaw, 28th Federal Reporter 529.

If the language used further on in Stein's Contract is examined, it will show still more plainly that his franchise is confined to bringing water from THREE MILE CREEK alone, viz: "And further shall have power and authority to conduct the water from *any part of the* THREE MILE CREEK so-called that the same may be good and wholesome," etc. Record M. p. 64.

"And the said Albert Stein * * doth hereby covenant and agree * * that he will introduce the water into the City of Mobile within the space of two years from the date hereof so that

the said City of Mobile and the inhabitants thereof may at all times be supplied with such a quantity of water as may be procured through the *said pipes as far as they are laid.* Record M. p. 65.

Now when the whole history of Mr. Stein's contract is thus examined and his construction of it and the construction put on it by the City and the Legislature at the time and since, and the principles of law are then applied, viz: That, if the meaning of the words be doubtful they shall be taken most strongly against the grantee and for the government and people. and that the grant cannot be extended by implication in favor of the grantee beyond the obvious meaning of the words employed, and that a doubt is fatal to grant; it is respectfully submitted that Mr. Stein has not and never had the exclusive privilege of supplying the City of Mobile and its inhabitants with water from every and all sources whatever.

Saginaw case, 28th Federal Reporter, 539,
Beaty vs. Lessee of Knowler, 4 Peters U. S. pages 152, (168), and other authorities previously cited.

V.

Mr. Stein's franchise expired in 1860

Even if the exclusive privilege of supplying water from any and all sources, and thus a complete monopoly, was ever conferred upon, or granted to Mr. Stein by the Legislature of Alabama, such exclusive privilege or monopoly expired in December 1860.

The Act of December 20th, 1820, appellant claims, granted such monopoly for forty years; that is, to the 20th day of December, 1860.

Section 3 of Act (Record M. p. 31).

The Agreement with Stein, confirmed by the Legislature of Alabama, gave him certain privileges as therein expressed, and which are claimed by Appellant to be sole and exclusive in supplying Mobile with water, for twenty years from 26th day

of December 1840, that is, until 26th day of December 1860. (Record M. ps. 56, 57, 69)

So it seems very clear that whether Mr. Stein claims such exclusive privileges under the Acts of the Legislature, or under the contract and agreement made by him with the City authorities of Mobile, such exclusive franchise and privileges expired in December 1860.

This above named agreement between Stein and the City authorities of Mobile, and which said agreement was afterwards confirmed by the Legislature of Alabama, to-wit, on the 7th day of February, 1841, (Record M. ps. 56, 71) stipulates that Stein "his executors, administrators and assigns, etc., * * shall have quiet possession of said works during their erection and after they shall have been completed for the term of twenty years and for any further time until the said parties of the first part (the City of Mobile) or their successors in office, shall redeem the said works from the said party of the second part (Stein) his executors, administrators or assigns according to the aforesaid stipulation." (Record M. ps. 60, 61).

And said agreement further provides that "the said Mayor, Aldermen and Common Council of the City of Mobile, for themselves and their successors in office hereby covenant and agree (he the said Stein, his executors, administrators and assigns well and truly complying with all and singular the within stipulations and agreements on his part to be done, performed and complied with) that he and his executors, administrators and assigns shall and may retain quiet possession of the said water works for the said term of 20 years without let, molestation or hinderance of the said Mayor, Aldermen and Common Council, or their successors in office, or any person or persons claiming by, through or under them, and that the said Albert Stein, his executors, administrators and assigns shall during the said term of 20 years and any further time until said works are redeemed as above stipulated have the exclusive privilege of supplying to the citizens and inhabitants of the City of Mobile

water from the water works aforesaid at the sum or price," etc. (Record M. ps. 61, 62).

It will be noticed that whenever a time *after* 1860 is mentioned, such time relates to Stein's not being paid for his *water works*, and the agreement thus provides that Stein shall not be interfered with in the possession and exclusive privilege of using them, that is his water works. After 1860 the franchise is gone. The exclusive monopoly of the water of Three Mile Creek is gone, but his property and the exclusive use of it is still with Mr. Stein, as any other property and the exclusive use thereof of such property which he might own, would be still left with him. There is no where in such agreement or in any of the Acts confirming it, any language which grants or gives Stein the sole or exclusive privilege of supplying the City of Mobile with water after the expiration of 20 years from the 26th day of December 1840, even from Three Mile Creek, and certainly no language which gives him such monopoly from any other source after the expiration of said 20 years. After 1860 Stein's rights are limited to the owning and using the property of the Water Works, and he has nothing more. His franchise and monopoly are gone. Nothing expressed in this agreement, or in any of the acts under which he claims, precluded any other grant from being made, or any other franchise from being bestowed, after the 26th day of December, 1860 to or upon any other Company, corporation, or person, to supply the City of Mobile and its inhabitants with water, provided the grantee should not interfere with Stein in the use and enjoyment of his own property, to-wit, his water works property, and should not interfere with Stein in competing for trade with any other Company, corporation or person.

Stein's rights were and are that he had the sole privilege of supplying Mobile and its inhabitants with water from Three Mile Creek for 20 years from December 26th 1840 and that after such time, to-wit, after the 26th day of December 1860, the

City of Mobile should have the right to purchase Stein's property in his water works at its actual value, and that until the City should so purchase, Stein, his executors, etc., should not be interfered with in the exclusive use of his property as his own, and that he could still use this property in supplying and selling water, in competing with others in the like business. There is no franchise any further in the matter. It has expired. There is no contract in his Charter or in his agreement that no other water works should be built on any other water course, or that water should not be supplied from any other source than Three Mile Creek and after the 26th of December 1860, this privilege or franchise for the sole use of water from Three Mile Creek expired.

VI.

Nothing is better settled than that Statutes creating monopolies, granting franchises and Charters of Incorporations must be construed liberally in favor of the public, and strictly against the grantee. Monopolies are justly regarded as encroachments upon the natural rights of the people and are viewed with jealousy by Courts.

Sedg. Stat. Law, ps. 329, 330.

Saginaw Gas L. Co. vs. City of Saginaw, 28th Federal Reporter, p. 539,

Binghampton Bridge Co. case, 3rd Wallace 51, and other authorities cited on this Brief.

The authority of the case of the New Orleans Water Works Company vs. Rivers, 115 U. S. p. 674 is cited by Appellant as an authority against this proposition and as covering Appellant's rights in this cause, and said authority seems to be confidently relied upon as giving Mr. Stein the exclusive privilege of supplying Mobile and its inhabitants with water. On examining the case of New Orleans Water Works Co. vs. Rivers, it will be seen that that case is widely different from this case now before this Court. The Charter of the New Orleans Water Works Company expressly granted that Company "the

exclusive privilege of supplying the City and inhabitants of New Orleans with water from the Mississippi River or any other Stream or river by means of pipes or conduits on or over any of the lands or streets of New Orleans," etc., 115 U. S. 677.

After the acceptance and exercise of this grant and franchise by the New Orleans Water Works Company, Rivers proceeded under an ordinance from the City Council of New Orleans to supply the St Charles Hotel with water from the Mississippi River by means of pipes and conduits running through the Streets of New Orleans. The Court held that by the express language of the grant to the New Orleans Water Works Co. it had the sole and exclusive privilege to bring this water from the Mississippi River through pipes and conduits through the Streets of New Orleans, and granted the Injunction prayed for against Rivers and stopped him from thus interfering with its rights. In the case now before this Court it is not claimed that the Appellee intends to bring water from Three Mile Creek, from which only Stein had an exclusive right to bring water, and it cannot be with reason contended that Stein had the exclusive privilege of using the streets of Mobile for pipes and conduits. The language used in Stein's agreement is: "Shall be *permitted* to use the streets in the City of Mobile free of charge for the purpose of laying pipes for the conveyance of water." (Record, M. p.55).

The two cases are entirely different. The principles we have contended for above in this brief would grant the injunction in the Rivers case and refuse it in the case at bar.

VII.

GENERAL ARGUMENT.

The right of the Appellee is plain and grows out of the duty it has assumed under the terms of its Charter. That duty, viz: The supply of water to the City of Mobile is of a public nature, the performance of which, the Supreme Court of the United States defines to be one of the highest functions of municipal government.

Provident Institution vs. Jersey City,
113 United States, 506, 516.

That duty is imposed on this Company by its Charter in plain and specific terms and arises *ipso facto* by the acceptance of the Charter.

The Appellee is thus seen to be an authorized agent of the sovereign power of the State for the performance of a public service of great importance to one of its chief municipalities. It is brought before the court while in the performance of that duty and its performance of that duty is sought to be enjoined by parties who claim adverse rights which they allege will be injured by this Appellee in the performance of this public duty.

The presumptions are all against the Appellant. He can claim nothing against the State and nothing not expressed in the grants to him. On his statement of the case, the Appellant must show in himself a very clear and indisputable right for the exclusive supply of water by it to the City of Mobile and its inhabitants from any and all sources before it can receive the aid of this Court to disturb this Appellee in the performance of the duty so imposed upon it, and which it is now seeking to perform.

The right of the Appellant, at this time, rests *solely* on the fact that the City of Mobile has not purchased his plant as it was authorized to do by the contract between it and Appellant's testator in 1840. All Appellant's right, except such as exists by reason of that non-purchase, has long since expired. The presumption is evident that the reason of this non-purchase by the City arose from the fact of the utter insufficiency and inability of the Stein Water Works to supply the demand for water of the City of Mobile and its inhabitants.

The Stein works draw their supply of water wholly from Three-Mile Creek and its tributaries and from no other source. The Bienville Company proposes to draw its water wholly from another source, to-wit, Eight-Mile Creek.

The right of Appellant rests on a contract made with the

City of Mobile on December 26th, 1840, confirmed by the Legislature of Alabama by an Act approved January 7th, 1841.

Before this time, the Bill shows there had been much legislation on the subject and sundry attempts had been made to bring water into the City of Mobile by means of corporations chartered for that purpose, but it does not appear, and it does not seem, that at the time of the agreement with Mr. Stein in 1840, any of said proposed corporations were in existence, or had in fact ever been organized, nor have any been since organized by the owners of the Stein Water Works, or by any parties claiming under them.

By act of December 24th, 1824, the Charter of the first aqueduct company which had been authorized by act of December 20th, 1820, was declared by the General Assembly to be null and void by reason of the corporation not having complied with the conditions of its Charter, whatever privileges it had, were declared to be vested in the City Corporation.

Said act of December 20th, 1820, is found on marginal pages from 26 to 37 of the Record.

So much of the Statute of 24th of December 1824, which Act is entitled "An Act to alter and amend the Charter of Incorporation of the City of Mobile," as refers to this matter is as follows:

"SECTION 18. *And be it further enacted*, That the act entitled "An Act to incorporate an Aqueduct Company in the City of Mobile," passed December 20th, 1820, be and the same is hereby declared *null and void*, the said Company having failed to comply with the requisitions of said Act, and all the rights, privileges and immunities, powers, prerogatives and authority which appertain to the said Company by virtue of the aforesaid act, are hereby transferred to and vested in the Corporation of the City of Mobile for the use and benefit of the inhabitants thereof. approved December 24th, 1824."

Acts of Alabama 1824-5, page 68.

The term of its privileges was to be for forty years provided that within three years of its charter it had introduced water

into the City of Mobile from Three-Mile Creek. Not having complied with this condition, its charter was declared null and void.

The Charter further enacted, that upon the expiration of those years of privilege or monopoly, all its property, and rights as an Aqueduct Company were vested in the City for the use of its citizens. There was no provision for any payment to it by the city for any of its property. (Record M., p. 31).

Those forty years of privilege or monopoly expired in December 1860.

In 1836 an attempt was again made by the authorities of the City of Mobile to obtain some kind of water supply. The City under former legislation had become the owner of the property connected with the water system, and in December 1836 it contracted with Henry Hitchcock to lease to him this property for a term of 20 years, he to repair and put the same in order, and thereby thereafter supply water to the City. At the end of 20 years, the City was to repay Hitchcock what he might have expended on the works in repairs and improvements. (Record M. pages 38-50).

By act of December 25th, 1837, the agreement between the City and Hitchcock was confirmed and another Aqueduct Company was authorized to be organized and the Hitchcock interest merged in it. This Corporation was to assume Hitchcock's place. It was to have the rights and privileges of the former Aqueduct Company and continue a corporation after its organization with these rights, until December 1st, 1856, or until such time as the City should purchase it, as provided by contract with Hitchcock in the agreement of 1836.

(Record M. pages 50, 53-54).

The City seems to have assumed to invest in the stock of this Company to the extent of the notes which had been given to it by Hitchcock under his contract of 1836, amounting to some $26,000. How much farther this Company was ever organized, does not appear. (Record M. pages 40, 41; M. ps. 54, 55.)

But, however this may have been, the contract with Stein shows that the city had become the owner of these works before the Stein contract was made, and by that contract the City agreed to sell him so much of those pipes as might be found suitable for Stein's purpose, and that the water system as then in existence should be abandoned.

Stein's Contract, Record M. p. 56, *et. seq.*

So it appears that in fact, before the date of Stein's contract, this Aqueduct Company had in some manner been purchased out by the City and the terms of its Charter complied with, so that all the privileges of being a corporation conferred upon it and the right of introducing water into the City of Mobile, expired on December 1st, 1856, which was the time fixed for the expiration of Hitchcock's rights for the water supply of Mobile, as provided by his contract with the City in 1836.

Thus it appears that at the time of making this contract with Stein in December, 1840, the Charter of the Aqueduct Company under the Act of 1820 had been vacated and annulled, that of the original term of monopoly of 40 years (provided no annullment of its privileges had occurred) only 20 years, or until 1st of December, 1860, still remained, but this had become void. The Charter of 1820, and the privileges under it were revived to the Aqueduct Company by the Act of 1837. When the Stein contract was made in December, 1840, the property of the Aqueduct Company had all been acquired by the City, and all the privileges of the Company had then ceased.

In December, 1840 comes the agreement with Stein and the confirmatory act of the General Assembly of Alabama of January 7th, 1841.

The rights of Stein rest alone on these documents. Except as derived from them he and those claiming under him have no rights in the premises. The contending parties here are a private person on the one side and a municipal corporation on

the other, having its powers, not of natural right but altogether derived from the sovereign who created it.

These parties were dealing with a matter of public concern and in which the public interest was greatly involved. Stein contracts to furnish a supply of water to the City of Mobile, from the consumers of which he was to receive therefor compensation at the rates agreed upon, and there was also to be assured to him certain privileges. These privileges, or this monopoly, were to be measured by a period of time, and by the exclusive right to obtain his supply of water from a *certain named source*. He was to have the exclusive right for the term of 20 years from December 26th, 1840, of carrying into Mobile and selling to its inhabitants the water that might be obtained and brought into the City from the stream known as Three-Mile Creek. No other source or stream is mentioned in the contract. This is the plain meaning of the Agreement that was made. The time of this exclusive right, that is the time during which it was to be enjoyed by him and his assigns, was to be 20 years, and so this is plainly provided. The source from which he was to obtain the water during the term of 20 years is plainly declared in the agreement.

Then the rule of law to be applied in the construction of such a contract between such parties for the purposes to be attained thereby is distinctly laid down by the authorities. This principle is that the Charter for a corporation is to be strictly construed against the corporation and no franchise granted by the State is ever construed to be exclusive, whether it be in the nature of a contract or not, unless it be so declared in clear terms or be necessarily implied. The element of exclusiveness must appear in the grant itself. This rule is universal without exception and rests upon sound policy.

Authorities previously cited. Also

Newton vs. Commissioners, 100 U. S. 548

Railroad Commissioners cases, 116 U. S. 307.

In the attempt of Mr. Stein to secure exemption from taxa-

tion on his works, the Supreme Court of Alabama, applied the rule.

Stein vs. Mayor of Mobile, 17 Alabama 234

Stein vs. Mayor of Mobile, 24 Alabama 591.

It is evident that the authorities of the City of Mobile could not in their own right confer any exclusive right whatever upon Mr. Stein.

79th Alabama 465

28th Federal Reporter 529.

Stein's rights must therefore be based on the Act of 7th of January, 1841, which confirms and gives life to the agreement between Mr. Stein and the City of Mobile made on the 26th day of December, 1840.

VIII.

Appellant claims that to him belongs solely and exclusively the right to supply the City and inhabitants of Mobile with water from any and all sources. The claim thus broadly stated would forbid the citizens to obtain water for themselves by means of pumps, wells or cisterns. Such a claim would not be countenanced. Yet wherein would such claim be more objectionable than is the claim here asserted? Appellant must show beyond a doubt that his contract was and is exclusive of any right that the sovereign had to advance the public benefit by the application of recent discoveries or improvements, which at the time of the acquisition of Appellant's rights were unknown. The assertion of the defense is, that if such grant exists, it must be positively shown to have been made by competent authority, and by the use of language whose meaning is without doubt. Mere inferences and arguments are not sufficient. Plain and distinct words giving such rights must be shown in the grant itself. If a doubt exists, the grant has not been made, for the mere fact of a doubt destroys the grant. All doubts will be resolved in favor of the public and against the grantee.

It will be observed that throughout the whole agreement the exclusive right granted to Mr. Stein is thus described: "The sole privilege of supplying the City of Mobile with water from Three-Mile Creek." This right is exclusively confined to water from that stream. No other source of supply, stream or creek, is anywhere mentioned or hinted at in the whole agreement, or in any of the documents under which Stein claims. His privilege is never mentioned in connection with any other streams or source of supply. Argument can not make the matter more plain than appears from a mere inspection of these documents. The confirmatory act of January, 1841, in no way changes or modifies the grant in this respect. The contract is simply confirmed by the Act.

The grant then is and can be nothing else than the grant of the sole and exclusive privilege of supplying the City with water from Three-Mile Creek, and from no other source. It is more apparent that no other source was intended to be contracted about from the declaration subsequently made in the agreement that Mr. Stein might introduce the water into the City *from any part of* THREE-MILE CREEK, provided it was good water, but at all times the only source of supply contemplated by the parties or mentioned or referred to in their contract was the Three-Mile Creek and none other. (Record M. p. 64.)

The mere mention of that stream in the contract excludes the notion of any other source of supply being intended.

It is true that the larger grant would include the less. A sole privilege from all sources would include the sole privilege of any one of those sources. But the contract is dealing with the rights of two parties, one Stein, the other the public, and the rule is that as to the individual the grant is to be strictly construed, as to the public it is to be liberally construed, and nothing will be held to be granted but what is plainly in the words of the grant. As expressed by the Courts, "In the construction of a charter, to be in doubt is to be resolved, and every resolution which springs from doubt is against the Corporation.

Cooley's Const. Lim. M p. 395 and Notes.

And this rule is not confined to Corporations, but extends to all grants of franchises and privileges to individuals.

Cooley's Const. Lim. M. p. 396.

This construction is again conclusively shown by the provisions of the Act of December, 1841, amendatory of the Act of January, 1841, which gave legislative sanction to the agreement between Mr. Stein and the City made in December, 1840.

The Act of January 7th, 1841, is printed in the record from pages 56 to 72, and so much of the act approved December 25th, 1841, as is deemed necessary for the understanding of this act and all of said Act which refers to this matter is as follows:

"An Act to be entitled an Act to amend an Act passed the 7th day of January, 1841, entitled An Act for the promotion of the Health and Convenience of the City of Mobile, by the introduction into said City, of a supply of wholesome water, to be used for domestic purposes, and for the extinguishment of fires.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Alabama, in General Assembly convened:* That it shall be lawful for Albert Stein, his executors, administrators and assigns, as often as it may be necessary, during the continuance of the privileges granted in the Act to which this Act is amendatory, to apply at any time to the judge of the county court of Mobile county, or in his absence to the clerk thereof for a writ of *ad quod damnum*, which it shall be the duty of the said judge or clerk to issue immediately on such application, directed to the Sheriff of Mobile county, commanding him to summon the *proprietors of land at any point on the Bayou Chatogue or Three-Mile Creek, at which the said Albert Stein, his executors, administrators or assigns shall conclude to fix his or their aqueduct, dams or reservoir and also the proprietors of lands above and below the said points on the said bayou or creek*, who may claim compensation for damages, in consequence of the said works, and also to summon a jury of seven discreet freeholders of the said county to view the said premises, at a time not exceeding ten days from the issuing of the writ aforesaid: and the jury shall examine the *banks of the stream above and below the said points*, and shall ascertain what amount of damage the said

proprietors may sustain by the withdrawal of water or otherwise in consequence of the erection of the said works. And if the said Albert Stein, his executors, administrators and assigns, shall require any land for the use of his canal or ditches, or through which to pass his pipes, or for any of the purposes authorized by the Act to which this is amendatory, then the said jury shall ascertain the damage that the owner of the said land may sustain in consequence thereof; and it shall be the duty of the sheriff to return the verdict or verdicts of the said jury to the clerk of the county court as soon as the same shall have been agreed upon by the said jury, or a majority of the same."

Acts of Alabama, December, 1841, page 5.

When it became necessary for the purpose of this water supply to condemn for its use the rights of riparian owners to the flow of the water on which their lands bounded and also the lands bounding on the stream, this right of condemnation was *confined to the owners of the lands on* THREE-MILE CREEK. No right to condemn any other lands or flow of water was given except on Three-Mile Creek. This right of condemnation was confined exclusively to that stream. Those Acts of January and December, 1841, are contemporaneous with the construction of the Stein Works. They form part of the *res-gestae* in this case, and necessarily must be taken into consideration as such when the proper meaning and extent of the transaction is sought to be arrived at.

The Act of January 7th, 1841, vested in Mr. Stein the benefits which were granted by the Acts of 1820 and 1837 to the Mobile Aqueduct Company and to the City of Mobile *not inconsistent with the terms of the agreement between Mr. Stein and the City of Mobile.* (Record M. p. 69.)

Certainly a sole privilege for 40 years from all sources is a very different thing from a sole privilege for 20 years from a definitely expressed source. Whatever rights are taken under the Acts of 1820 and 1837 must be consistent with the grant of 1841. Under the latter there is a precise term named, and a precise and well ascertained source of supply and that must prevail over all other claims based on the use of general lan-

guage, especially must this be the case in a matter of this kind where a private claim for a monopoly is set up against a public right in which the whole community is concerned and which is based upon a contract between a private party and the public.

All other sources of supply of water, except Three-Mile Creek, were left open for public use, unrestricted by any rights of Appellant.

This franchise and right to supply water from Three-Mile Creek was, and is all the Stein owners acquired by their contract with the City. If, as is thus contended for by Appellee, the Stein right is limited to the water from Three-Mile Creek, then the claim of an extended time of Stein's rights is of no consequence in this case. It is respectfully submitted that it is previously shown in this Brief that such time expired in 1860.

IX.

In the language of our eminent Counsel, Mr. Peter Hamilton, now deceased, in arguing this cause for the Defendant in the Court below, "The granted term of 20 years to Mr. Stein has long since expired, and so also have expired all rights proposed to earlier enterprises of the same character. The Stein owners have continued in the undisturbed use and enjoyment of their property and of the water and stream from which their works have obtained their supply. The City has not purchased the property for the best of reasons and the Stein owners have never attempted to compel it to make the purchase by any legal proceedings of any kind. They have simply remained in the quiet possession and enjoyment of their property and are now in its undisturbed enjoyment, with all the profits and emoluments which they furnish, and no attempt has been made or is threatened to be made to interfere with that possession and enjoyment. They are now, as they have always been since their works were erected, quietly enjoying all the benefits and advantages to be reaped therefrom, though so far as the public is concerned,

they are furnishing but little of the advantages in consideration of which their privilege was granted to them.

The Defendant is constructing a system of works to bring water into the City from a stream entirely distinct from the stream from which the Stein works draw their supply. It began its enterprise long after the expiration of the 20 years, during which the sole privilege granted to Stein was to exist, and obtains its supply not at all, or in any way from Three-Mile Creek, but from an entirely distinct source, and from which the Stein owners have never attempted to take any of the water which enters into or passes through their pipes, or can be carried through their works. There is nothing in the proceedings of the Bienville Water Supply Company, which at all affects or impairs "the exclusive privilege granted to Stein" of supplying to the citizens and inhabitants of the City of Mobile water from the water works aforesaid."

That being the case, as clearly appears, the Bienville Water Supply Company has not committed nor threatened to commit any trespass on the rights of Stein, and it follows that there is no equity in the Bill of Complaint and no right in Stein to restrain the Bienville Company from prosecuting its enterprise and introducing into the City the water it has undertaken to introduce and so discharging the public duty imposed upon it by its Charter, and the application for an Injunction should be refused, and the rulings of the Circuit Court below should be affirmed.

D. P. BESTOR,

Of Counsel for the Bienville Water

Supply Company, the Appellee.

APPENDIX

AN ACT

To amend Sections one, five and eleven of an Act to incorporate the Bienville Water Supply Company, approved February 19th, 1883.

SECTION 1. *Be it enacted by the General Assembly of Alabama*, That Section 1, of the Act to incorporate the Bienville Water Supply Company be, and the same is hereby so amended as to read:

Be it enacted by the General Assembly of Alabama, That George A. Ketchum, Thomas Henry, Wm. Butler Duncan, William J. Hearin, P. Hamilton, Julien W. Whiting, David R. Dunlap, O. F. Cawthon, Dan'l P. Bestor, their associates and successors be, and the same are hereby made a body politic and corporate, by the name and style of the Bienville Water Supply Company, and as such corporation they are hereby vested with all the powers and privileges of private corporations under the laws of this State.

SEC. 2. *Be it further enacted*, That the 5th Section of said Act be so amended as to read:

Be it further enacted, That until a board of directors be elected by the shareholders as herein directed, any five of the corporators hereinbefore named, or of their associates, shall be authorized to open books in the Port of Mobile, or elsewhere, as they may direct, for subscriptions to the capital stock of said corporation, upon such terms as to payment by the subscribers thereof as said five persons may, by resolution, determine to be placed at the head of the subscription list. When the sum of fifty thousand dollars shall have been subscribed, said corporation who have obtained such subscription, shall call a meeting of the subscribers at such time and place as they may appoint. At such meeting said subscribers shall elect a board of seven directors to serve one year and till their successors are elected, who shall proceed and organize said corporation, upon filing with the judge of probate of Mobile county a certificate of organization as herein directed, signed by the persons who superintended the subscriptions to the stock, or a majority of them. Said corporation may enter upon, and thereafter transact and carry on the business hereby authorized to be transacted and carried on by said corporation.

SEC. 3. *Be it further enacted*, That the 11th Section of said Act be so amended as to read:

Be it further enacted, That said corporation shall have and enjoy the exclusive right of conducting and bringing water from any point, other than Three Mile Creek in the County of Mobile, for the supply of said Port of Mobile and village of Whistler, for the period of twenty years from the time when said water shall have been brought within the limits of the Port of Mobile, and be ready for distribution, and supply to the inhabitants of the Port of Mobile, and the houses and dwellings within the limits of said Port. And till the municipal authorities of said Port and village, if so by law authorized, shall purchase the water works and property of said corporation as hereinafter provided, but said corporation within four years from the passage of this act, must begin its works, and within six years from the date of the passage of this act, must cause water to be conducted into the Port of Mobile from some stream, point or place as hereinbefore named, and if and when any existing claim to conduct water into Mobile from Three Mile Creek, or any other point without the limits of said Port, has been obtained by this corporation, then said corporation shall have the exclusive right to supply said Port and village and the inhabitants thereof with water for the period and the term aforesaid. But nothing in this act shall be construed to prohibit the organization hereafter of any company for the purpose of supplying the City of Mobile or any other place with water which does not interfere with the property rights or rights of obtaining water pertaining to this company. In making contracts for labor and materials in the construction of works, by this act authorized, said corporation, by its directors, are hereby empowered to stipulate for payment in whole or in part, by the issue of shares of capital stock of said corporation to said contractors, but in no event shall the issue of certificates of capital stock exceed the amount of capital hereinbefore authorized. Approved February 14th, 1885.

APPENDIX

AN ACT

To amend Sections one, five and eleven of an Act to incorporate the Bienville Water Supply Company, approved February 19th, 1883.

SECTION 1. *Be it enacted by the General Assembly of Alabama*, That Section 1, of the Act to incorporate the Bienville Water Supply Company be, and the same is hereby so amended as to read:

Be it enacted by the General Assembly of Alabama, That George A. Ketchum, Thomas Henry, Wm. Butler Duncan, William J. Hearin, P. Hamilton, Julien W. Whiting, David R. Dunlap, O. F. Cawthon, Dan'l P. Bestor, their associates and successors be, and the same are hereby made a body politic and corporate, by the name and style of the Bienville Water Supply Company, and as such corporation they are hereby vested with all the powers and privileges of private corporations under the laws of this State.

SEC. 2. *Be it further enacted*, That the 5th Section of said Act be so amended as to read:

Be it further enacted, That until a board of directors be elected by the shareholders as herein directed, any five of the corporators hereinbefore named, or of their associates, shall be authorized to open books in the Port of Mobile, or elsewhere, as they may direct, for subscriptions to the capital stock of said corporation, upon such terms as to payment by the subscribers thereof as said five persons may, by resolution, determine to be placed at the head of the subscription list. When the sum of fifty thousand dollars shall have been subscribed, said corporation who have obtained such subscription, shall call a meeting of the subscribers at such time and place as they may appoint. At such meeting said subscribers shall elect a board of seven directors to serve one year and till their successors are elected, who shall proceed and organize said corporation, upon filing with the judge of probate of Mobile county a certificate of organization as herein directed, signed by the persons who superintended the subscriptions to the stock, or a majority of them. Said corporation may enter upon, and thereafter transact and carry on the business hereby authorized to be transacted and carried on by said corporation.

SEC. 3. *Be it further enacted*, That the 11th Section of said Act be so amended as to read:

Be it further enacted, That said corporation shall have and enjoy the exclusive right of conducting and bringing water from any point, other than Three Mile Creek in the County of Mobile, for the supply of said Port of Mobile and village of Whistler, for the period of twenty years from the time when said water shall have been brought within the limits of the Port of Mobile, and be ready for distribution, and supply to the inhabitants of the Port of Mobile, and the houses and dwellings within the limits of said Port. And till the municipal authorities of said Port and village, if so by law authorized, shall purchase the water works and property of said corporation as hereinafter provided, but said corporation within four years from the passage of this act, must begin its works, and within six years from the date of the passage of this act, must cause water to be conducted into the Port of Mobile from some stream, point or place as hereinbefore named, and if and when any existing claim to conduct water into Mobile from Three Mile Creek, or any other point without the limits of said Port, has been obtained by this corporation, then said corporation shall have the exclusive right to supply said Port and village and the inhabitants thereof with water for the period and the term aforesaid. But nothing in this act shall be construed to prohibit the organization hereafter of any company for the purpose of supplying the City of Mobile or any other place with water which does not interfere with the property rights or rights of obtaining water pertaining to this company. In making contracts for labor and materials in the construction of works, by this act authorized, said corporation, by its directors, are hereby empowered to stipulate for payment in whole or in part, by the issue of shares of capital stock of said corporation to said contractors, but in no event shall the issue of certificates of capital stock exceed the amount of capital hereinbefore authorized. Approved February 14th, 1885.